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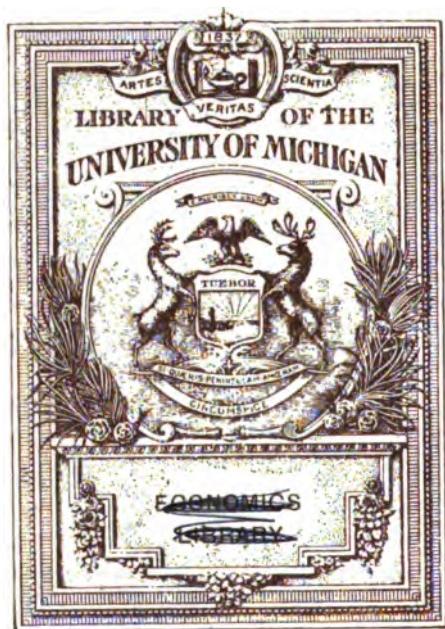
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**LIABILITY OF RAILROADS  
TO  
INTERSTATE EMPLOYEES**



THE LIABILITY  
OF  
RAILROADS  
TO  
INTERSTATE EMPLOYEES

A STUDY OF CERTAIN ASPECTS OF FEDERAL  
REGULATION OF THE REMEDY FOR DEATH  
OR INJURY TO EMPLOYEES IN THE SER-  
VICE OF INTERSTATE RAILROADS

By

PHILIP J. DOHERTY  
OF THE BOSTON BAR

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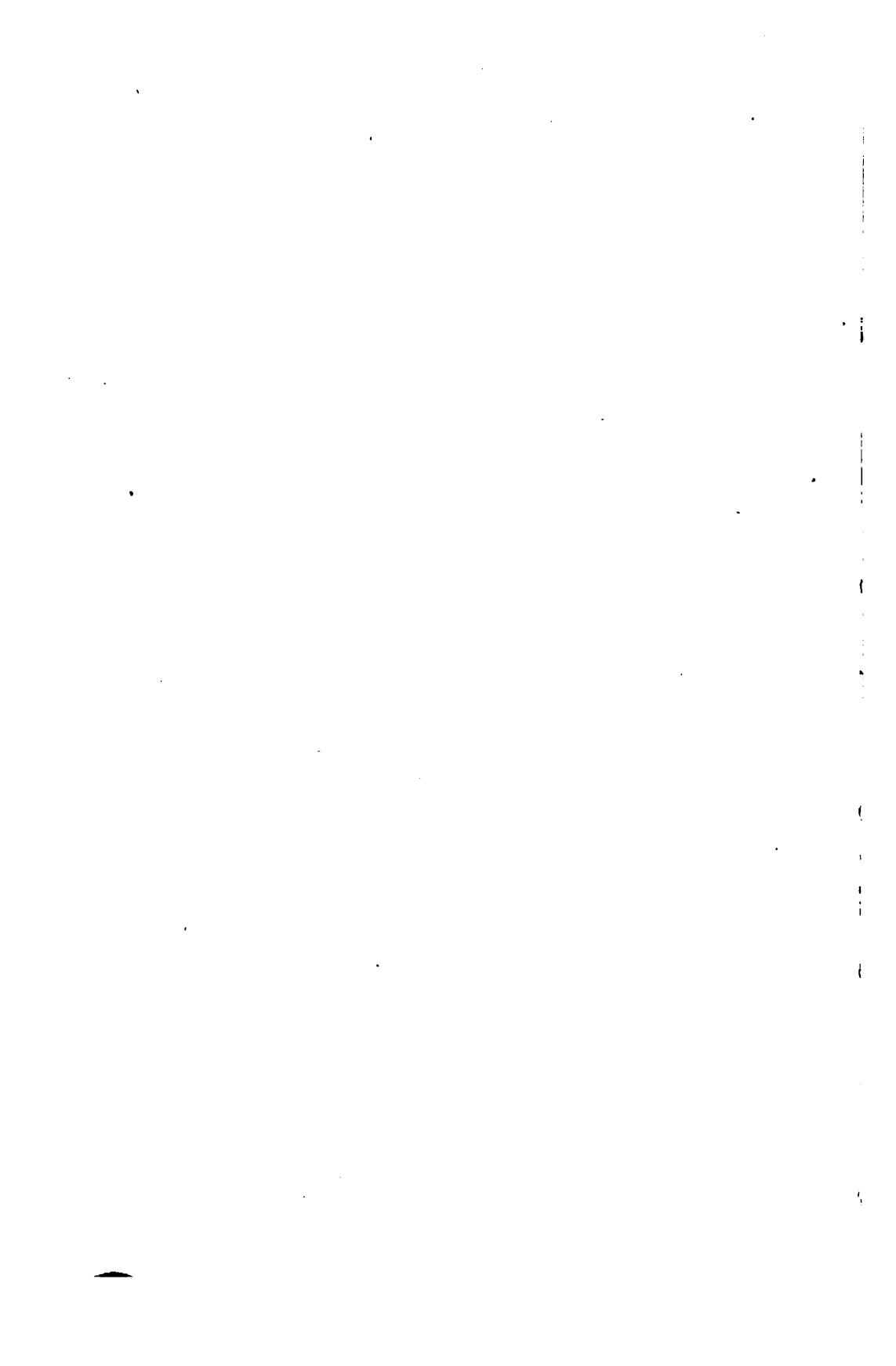
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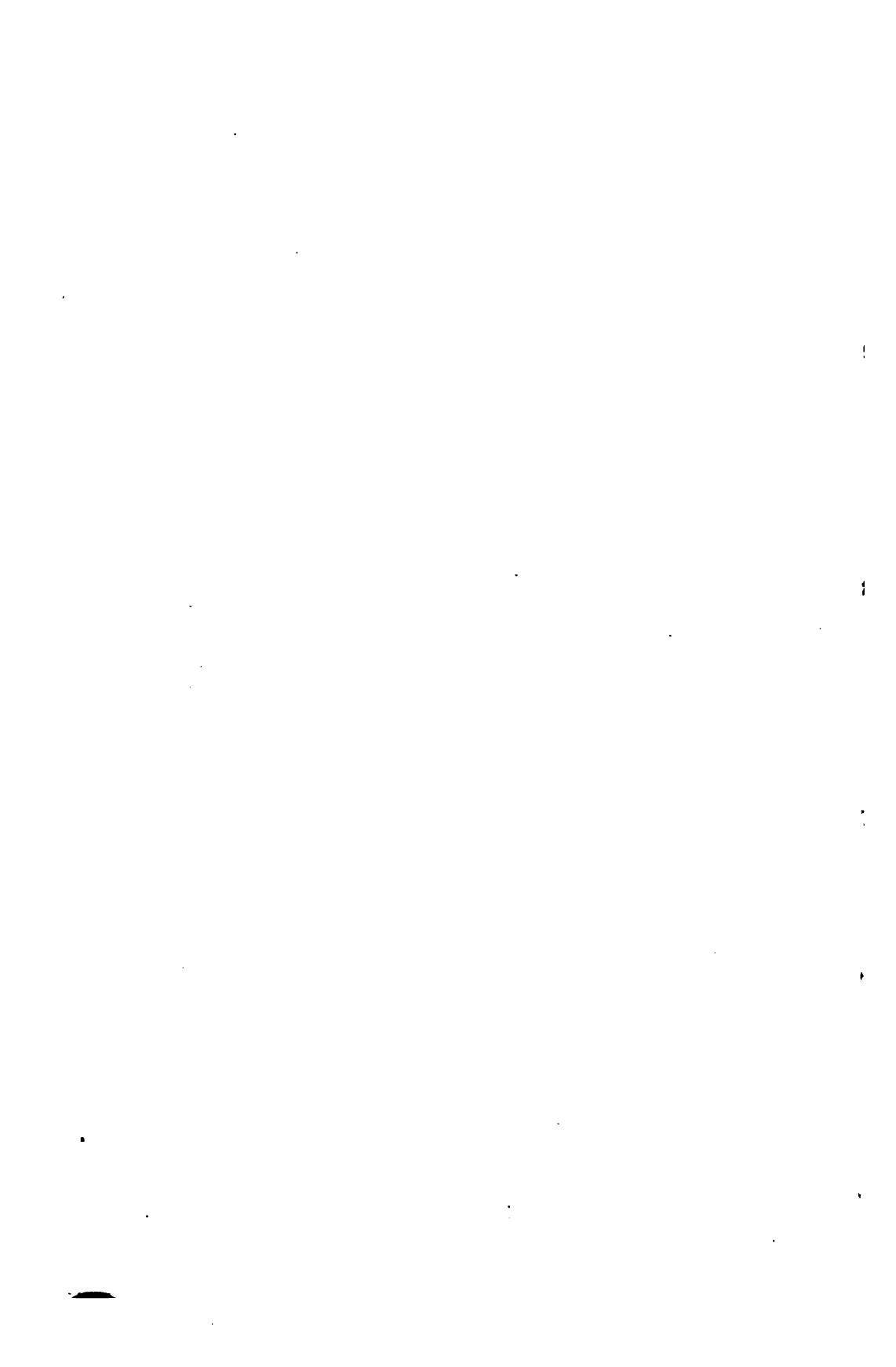
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## CONTENTS

	PAGE
<b>INTRODUCTION . . . . .</b>	<b>29</b>

### PART I

#### THE EMPLOYERS' LIABILITY ACTS

##### CHAPTER I

###### EMPLOYERS' LIABILITY ACTS OF 1908 AND 1910

<b>SEC. 1. Summary . . . . .</b>	<b>37</b>
<b>SEC. 2. Congressional Intent . . . . .</b>	<b>39</b>
<b>SEC. 3. Report of Senate Judiciary Committee . . . . .</b>	<b>42</b>

##### CHAPTER II

###### FELLOW SERVICE, CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

<b>Sec. 4. Fellow-Servant Doctrine in General . . . . .</b>	<b>45</b>
<b>Sec. 5. Basis of Fellow-Servant Doctrine . . . . .</b>	<b>45</b>
a. Perils Compensated for in Wages . . . . .	45
b. Employee Voluntarily Assumes the Risk . . . . .	48
c. Public Policy . . . . .	51
d. Risk of Injury is an Obvious Risk of the Employment . . . . .	53
e. Saving of Industry from being Over- burdened . . . . .	54
f. Theory that Rule Tends to Make Employees more Watchful of Each Other . . . . .	55
<b>Sec. 6. The Intent of the Act Clearly to Abrogate the     Fellow-Servant Doctrine . . . . .</b>	<b>57</b>
<b>Sec. 7. Act Restricts Application of Contributory Neg-     ligence and Assumption of Risk . . . . .</b>	<b>58</b>

## CONTENTS

## CHAPTER III

## NATURE OF ACTION

	PAGE
SEC. 8. Act Authorizes New Plenary Action . . . . .	63
SEC. 9. Federal Act, where Applicable, is Exclusive . . . . .	65
SEC. 10. Necessity of Pleading Basis for Federal Right . . . . .	66

## CHAPTER IV

## WHEN IS A RAILROAD ENGAGED IN INTERSTATE COMMERCE?

SEC. 11. In General . . . . .	68
SEC. 12. International Text Book Company Case . . . . .	70
SEC. 13. Authorities upon Decided Issues . . . . .	73
SEC. 14. Summary from Authorities . . . . .	81
SEC. 15. Method of Proof . . . . .	82
SEC. 16. Act Applies to Interstate Electric Lines . . . . .	82

## CHAPTER V

## WHAT EMPLOYEES ARE ENGAGED IN INTERSTATE COMMERCE?

SEC. 17. Employees Included in the Act . . . . .	84
SEC. 18. Employment must Relate to Movement of Traffic . . . . .	90
SEC. 19. Causal Relation between Employment and Injury . . . . .	96

## CHAPTER VI

## CONSTRUCTION OF THE ACT

Sec. 20. Statute not Retroactive . . . . .	99
Sec. 21. No Recovery when Injury Caused Solely by Plaintiff's own Negligence . . . . .	99
Sec. 22. Venue of Action . . . . .	100
Sec. 23. Jurisdiction Concurrent in State and Federal Courts . . . . .	100

## CONTENTS

7

	PAGE
SEC. 24. Survival of Action . . . . .	100
SEC. 25. Construction of Section I of the Act of 1908 . .	101

## CHAPTER VII

### STATUTES FOR SAFETY OF EMPLOYEES AND EFFECT OF THEIR VIOLATION

SEC. 26. Effect of the Violation of "Any Statute" . . . . .	111
SEC. 27. The Safety Appliance Acts . . . . .	112
SEC. 28. The Hours of Service Law . . . . .	115
SEC. 29. The Ash Pan Law . . . . .	117
SEC. 30. The Locomotive Boiler Inspection Law . . . . .	118
SEC. 31. State Statutes . . . . .	118

## CHAPTER VIII

### DAMAGES AND SUIT BY POOR PERSON

SEC. 32. Damages for Personal Injuries . . . . .	126
SEC. 33. Damages for Death Prior to 1910 . . . . .	126
SEC. 34. Amendatory Act of 1910 . . . . .	127
SEC. 35. Annuity Tables . . . . .	128
SEC. 36. Suit by Poor Person . . . . .	130

## PART II

### THE CONSTITUTIONALITY OF EMPLOYERS' LIABILITY ACT OF 1908

## CHAPTER IX

### CONGRESS MAY REGULATE THE RELATION BETWEEN MASTER AND SERVANT ENGAGED IN INTERSTATE COMMERCE

SEC. 37. Constitutionality of the Act: In General . . . . .	132
SEC. 38. Review of Authorities in which Power of Regulation is Implied . . . . .	133

## CONTENTS

	PAGE
SEC. 39. It is a Regulation of Terms and Conditions under which Interstate Commerce is Moved . . . . .	140
SEC. 40. It Furthers a Free Flow of Commerce by Promoting Industrial Peace . . . . .	142
SEC. 41. Employees are Instrumentalities of Interstate Commerce . . . . .	144
SEC. 42. Relations between Company and Employee are not Local . . . . .	146
SEC. 43. Human Agency is most Important Factor in Movement of Commerce . . . . .	147

## CHAPTER X

**THE EMPLOYERS' LIABILITY ACT DOES NOT UNDULY ABRIDGE THE FREEDOM OF CONTRACT**

SEC. 44. The Contention of the Railroad Counsel . . . . .	157
SEC. 45. No Limitation upon Power of Congress to Restrict the Exercise of the Right of Contract . . . . .	158
SEC. 46. Theoretical Freedom of Contract is sometimes against Public Policy . . . . .	160
SEC. 47. Liberty of Contract is merely a Common-Law Right . . . . .	166
SEC. 48. This Act Frees Employee from the Burden of an Onerous Legal Fiction . . . . .	175
SEC. 49. This Doctrine has not Impaired Legislation Forbidding Contracts to Avoid the Consequences of Negligence in Handling Freight . . . . .	184
SEC. 50. This Doctrine cannot Impair an Express Legislative Power . . . . .	185
SEC. 51. This Doctrine Imports a Dangerously Loose Construction of the Constitution . . . . .	199

## CHAPTER XI

**THE ACT DOES NOT CREATE A DISCRIMINATORY CLASSIFICATION**

SEC. 52. The Contention of Railroad Counsel . . . . .	202
SEC. 53. Doctrine of Common Employment Involves same Classification . . . . .	203

## CONTENTS 9

PAGE

SEC. 54. Equal Protection of the Law Clause does not Restrain Normal Exercise of Governmental Power . . . . .	208
SEC. 55. Legislation Applicable only to Employees of Railroad Companies is not Arbitrary . . . . .	213
SEC. 56. The Inclusion of all Railroad Employees is a Reasonable Classification . . . . .	220

## CHAPTER XII

### CONGRESS MAY PROVIDE A REMEDY FOR INJURIES CAUSED BY INTRASTATE SERVANTS

SEC. 57. The Injury from a Cause within the Control of the Interstate Employer Constitutes the Interference with Interstate Commerce . . . . .	225
SEC. 58. The Impossibility of Segregating Intrastate from Interstate Employees . . . . .	228

## CHAPTER XIII

### A REVIEW OF THE HOXIE CASE

SEC. 59. Relation of this Act to Sovereignty of States . . . . .	230
SEC. 60. No Action under Two Thousand Dollars . . . . .	234
SEC. 61. Action by Personal Representative and Distribution of Fund . . . . .	238
SEC. 62. Railroad held to Liability of Insurer . . . . .	243
SEC. 63. Jurisdiction of State Courts . . . . .	245
SEC. 64. Justice and Policy of Fellow-Servant Rule . . . . .	273

**PART III****THE SAFETY APPLIANCE ACTS****CHAPTER XIV****ABSOLUTE MANDATORY OBLIGATION TO COMPLY WITH SAFETY  
APPLIANCE ACTS**

	PAGE
SEC. 65. Liability of Carriers under Act is Absolute . . .	276
SEC. 66. Duty of Defendant Railroad the Same in Personal Injury Suits as in Actions for Statutory Penalty . . . . .	289

**CHAPTER XV****DEFINITION OF A "USE" OF A DEFECTIVE CAR**

SEC. 67. What is a "Use" of a Defective Car within the Meaning of the Safety Appliance Acts? . . .	296
SEC. 68. Defects in Violation of Safety Appliance Acts . .	312

---

APPENDIX . . . . .	317
INDEX . . . . .	349

## TABLE OF CASES

### A

Ableman <i>v.</i> Booth, 21 How. 506 . . . . .	254
Adair <i>v.</i> United States, 208 U. S. 161, 177, 178; 28 Sup. Ct. Rep. 277 . . . . .	136, 138, 186
Addyston Pipe & Steel Co. <i>v.</i> United States, 175 U. S. 211, 228, 229, 231; 20 Sup. Ct. Rep. 96 . . . . .	184, 185, 187, 196
Allen <i>v.</i> Tuscarora Val. R. Co., 229 Pa. 97 . . . . .	67
Allgeyer <i>v.</i> Louisiana, 165 U. S. 578; 17 Sup. Ct. Rep. 427	162
Armitage <i>v.</i> Lancashire & Yorkshire Ry. Co., 4 Minton- Senhouse Workmen's Compensation Cases, 5 . . . . .	96
Armour Packing Co. <i>v.</i> United States, 209 U. S. 56; 28 Sup. Ct. Rep. 428 . . . . .	78, 187
Asher <i>v.</i> Texas, 128 U. S. 129; 9 Sup. Ct. Rep. 1 . . . . .	141
Atchison, T. & S. F. Ry. Co. <i>v.</i> United States, 172 Fed. Rep. 1021 . . . . .	283
Atkin <i>v.</i> Kansas, 191 U. S. 207; 24 Sup. Ct. Rep. 124 . . . . .	196
Atlantic Coast Line Ry. Co. <i>v.</i> Riverside Mills, 219 U. S. 186; 31 Sup. Ct. Rep. 164, 168 . . . . .	137, 196
Atlantic Coast Line Ry. Co. <i>v.</i> United States, 168 Fed. Rep. 175 . . . . .	279, 283, 289
Augusta S. R. Co. <i>v.</i> Wrightsville and T. R. Co., 74 Fed. Rep. 522 . . . . .	77

### B

Baddeley <i>v.</i> Granville, 19 Q. B. Div. 428 . . . . .	165
Ballard <i>v.</i> Mississippi Cotton Oil Co., 81 Miss. 532; 34 So. Rep. 533 . . . . .	214
Baltimore and Ohio R. Co. <i>v.</i> Baugh, 149 U. S. 368, 384; 13 Sup. Ct. Rep. 914 . . . . .	147, 224, 227
Baltimore & Ohio R. Co. <i>v.</i> Interstate Commerce Commis- sion, 31 Sup. Ct. Rep. 621 . . . . .	117, 138
Baltimore & Ohio S. W. R. Co. <i>v.</i> Voight, 176 U. S. 498; 20 Sup. Ct. Rep. 385 . . . . .	184

## TABLE OF CASES

Baltimore & P. R. Co. v. Mackey, 157 U. S. 72 . . . . .	127
Bank of Arapahoe v. David Bradley Co., 72 Fed. Rep. 867 . . . . .	236
Barbier v. Connolly, 113 U. S. 27; 5 Sup. Ct. Rep. 357 . . . . .	189
Barque Chusan, 2 Story, 455, 464, 465 . . . . .	134
Bedford Quarries Co. v. Welch, 100 Fed. Rep. 513 . . . . .	236
Belt Ry. Co. of Chicago v. United States, 168 Fed. Rep. 542 . . . . .	74, 75, 80, 292
Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co., 92 S. W. Rep. 714 . . . . .	78
Bertholf v. O'Reilly, 74 N. Y. 509, 524 . . . . .	172
Black v. Charleston & W. C. Ry. Co., 69 S. E. Rep. 230 . . . . .	117
Blets v. Columbia Nat'l Bank, 87 Pa. St. 92 . . . . .	265
Boldt v. New York C. R. Co., 18 N. Y. 432 . . . . .	94
Booth v. Illinois, 184 U. S. 425; 22 Sup. Ct. Rep. 425 . . . . .	197
Boston & Maine R. Co. v. Hurd, 108 Fed. Rep. 116 . . . . .	67
Bowen v. Illinois C. R. Co., 136 Fed. Rep. 306 . . . . .	97
Bowman v. Chicago & N. W. Ry. Co., 125 U. S. 465; 8 Sup. Ct. Rep. 689, 1062 . . . . .	151
Boyce v. Railway, 63 Iowa, 70; 18 N. W. Rep. 673 . . . . .	286
Bradbury v. Chicago, R. I. & P. Ry. Co. (Iowa), 123 N. W. Rep. 1 . . . . .	132, 264, 235
Bradford Construction Co. v. Heflin, 88 Miss. 314; 42 So. Rep. 174 . . . . .	214
Briggs v. Chicago & N. W. Ry. Co., 125 Fed. Rep. 745 . . . . .	276
Brinckerhoff v. Bostwick, 88 N. Y. 60 . . . . .	265
Brinkmeier v. Missouri Pacific Ry. Co., 81 Kan. 101; 105 Pac. Rep. 221 . . . . .	67, 276, 280
Brown v. Houston, 114 U. S. 622; 5 Sup. Ct. Rep. 1091 . . . . .	151
Brown v. Walker, 161 U. S. 591, 606; 16 Sup. Ct. Rep. 644 . . . . .	261
Burke v. Norwich & W. R. Company, 34 Conn. 474, 479 . . . . .	273
Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. Rep. 1, 17 . . . . .	72

## C

Cain, Admx., v. Southern Ry. Co., U. S. Circuit Court, Knoxville, Tennessee 1911 . . . . .	126, 128
Campbell v. Chicago, M. & St. P. Ry. Co., 53 N. W. Rep. 323 . . . . .	77
Campbell v. Spokane & Inland Empire R. Co., East Dist. of Washington, not yet reported . . . . .	101

## TABLE OF CASES

13

Carson <i>v.</i> Southern Ry. Co., 46 S. E. Rep. 525 . . . . .	276
Cherokee Tobacco, The, 11 Wall. 616 . . . . .	263
Chesapeake & Ohio Ry. Co. <i>v.</i> American Exchange Bank, 92 Va. 495; 23 S. E. Rep. 935 . . . . .	263, 264
Chicago, B. & Q. R. Co. <i>v.</i> Iowa, 94 U. S. 155 . . . . .	196
Chicago, B. & Q. R. Co. <i>v.</i> McGuire, 219 U. S. 549; 31 Sup. Ct. Rep. 259 . . . . .	103, 139, 195, 198
Chicago, B. & Q. R. Co. <i>v.</i> United States, 31 Sup. Ct. Rep. 612 . . . . .	139, 282, 285
Chicago Cheese Co. <i>v.</i> Fogg, 53 Fed. Rep. 72 . . . . .	236
Chicago Junction Ry. Co. <i>v.</i> King, 169 Fed. Rep. 372, 377 . . . . .	87, 90, 276, 283
Chicago, K. & W. R. Co. <i>v.</i> Pontius, 157 U. S. 209; 15 Sup. Ct. Rep. 585 . . . . .	138, 216
Chicago, M. & St. P. R. Co. <i>v.</i> Minnesota, 134 U. S. 418; 10 Sup. Ct. Rep. 462, 702 . . . . .	76
Chicago, M. & St. P. Ry. Co. <i>v.</i> Ross, 112 U. S. 377; 5 Sup. Ct. Rep. 184 . . . . .	205
Chicago, M. & St. P. Ry. Co. <i>v.</i> Voelker, 129 Fed. Rep. 522 . . . . .	75, 276, 294
Chicago, M. & St. P. Co. <i>v.</i> United States, 165 Fed. Rep. 423 . . . . .	80, 283, 291
Chicago, R. I. & P. Ry. Co. <i>v.</i> Brown, 185 Fed. Rep. 80 . .	278
Chicago, R. I. & P. Ry. Co. <i>v.</i> Stahley, 62 Fed. Rep. 363 . .	142
Chicago, R. I. & P. Ry. Co. <i>v.</i> Zernecke, 183 U. S. 582; 22 Sup. Rep. Ct. 229 . . . . .	245
Chicago & N. W. Ry. Co. <i>v.</i> Osborne, 52 Fed. Rep. 912 . . . . .	75, 80
Chicago & N. W. Ry. Co. <i>v.</i> United States, 168 Fed. Rep. 236 . . . . .	291, 292
Cincinnati, N. O. & T. P. R. Co. <i>v.</i> Interstate Commerce Commission, 162 U. S. 184; 16 Sup. Ct. Rep. 700 . . . . .	80
Cincinnati Packet Co. <i>v.</i> Bay, 200 U. S. 179; 26 Sup. Ct. Rep. 208 . . . . .	76
Clafin <i>v.</i> Housman, 93 U. S. 30, 130, 136 . . . . .	251, 265
Clancy <i>v.</i> Barker, 131 Fed. Rep. 161 . . . . .	97
Cleveland, C. C. & St. L. Ry. Co. <i>v.</i> Baker, 91 Fed. Rep. 224	276
Coe <i>v.</i> Erroll, 116 U. S. 517; 6 Sup. Ct. Rep. 475 . . . . .	80
Cofrode <i>v.</i> Gardner, 79 Mich. 332; 44 N. W. Rep. 623 . .	267
Colasurdo <i>v.</i> Central R. R. of N. J., 180 Fed. Rep. 832 .	86, 132

## TABLE OF CASES

Coleman State <i>ex rel. v.</i> Kelly, 70 L. R. A. 450 . . . . .	276
Coley <i>v.</i> North Carolina R. Co., 128 N. C. 534; 39 S. E. Rep. 43 . . . . .	104, 276
Commonwealth <i>v.</i> Lehigh Valley R. Co., 17 Atl. Rep. 179 . . . . .	76
Cooley <i>v.</i> Port Wardens, 12 How. 299 . . . . .	147
Copp <i>v.</i> Louisville & N. R. Co., 43 La. Ann. 511; 9 So. Rep. 441 . . . . .	265
Cound <i>v.</i> Atchison, T. & S. F. Ry. Co., 173 Fed. Rep. 527 . . . . .	65, 66
Covington & C. Bridge Co. <i>v.</i> Kentucky, 154 U. S. 204; 14 Sup. Ct. Rep. 1087 . . . . .	77
Crawford <i>v.</i> New York C. & H. R. R. Co., 10 Am. Neg. Rep. 166 . . . . .	80, 276, 307
Crowley <i>v.</i> Christensen, 137 U. S. 86; 11 Sup. Ct. Rep. 13 . . . . .	188, 196
Crutcher <i>v.</i> Kentucky, 141 U. S. 47; 11 Sup. Ct. Rep. 851 . . . . .	151
Cutting <i>v.</i> Fla. Ry. & Nav. Co. <i>et al.</i> , 46 Fed. Rep. 641 . . . . .	78

## D

Daniel Ball, The, 10 Wall. 557 . . . . .	79, 292
Davis <i>v.</i> Southern Ry. Co., 60 S. E. Rep. 722 . . . . .	76
Dawson <i>v.</i> Chicago, R. I. & P. Ry. Co., 114 Fed. Rep. 870 . . . . .	276, 313
Debs, Petitioner, <i>In re</i> , 158 U. S. 564; 15 Sup. Ct. Rep. 900. 31, 70, 143, 151, 153, 226	
Defiance Water Company <i>v.</i> Defiance, 191 U. S. 184; 24 Sup. Ct. Rep. 63 . . . . .	259
Dek <i>v.</i> St. Louis & S. F. R. Co., 31 Sup. Ct. Rep. 617 . . . . .	285, 288
Denver & R. G. R. Co. <i>v.</i> Arrighi, 129 Fed. Rep. 347 . . . . .	276, 288
Denver & R. G. R. Co. <i>v.</i> Gannon, 90 Pac. Rep. 853 . . . . .	276
Devine <i>v.</i> Illinois Central R. Co., 156 Ill. App. 369 . . . . .	276
Dinamore <i>v.</i> Racine M. R. Co., 12 Wis. 649 . . . . .	292
Donegan <i>v.</i> Baltimore & N. Y. Ry. Co., 165 Fed. Rep. 869 . . . . .	276, 283
Dred Scott Case, 19 How. 393, 614 . . . . .	150
Dunbar <i>v.</i> Charleston & N. C. Ry. Co., 186 Fed. Rep. 175 . . . . .	64
Duncan <i>v.</i> Missouri, 152 U. S. 377; 14 Sup. Ct. Rep. 570 . . . . .	218

## TABLE OF CASES

15

## E

Elmore <i>v.</i> Seaboard Air Line Ry. Co., 41 S. E. Rep. 786 . . . . .	276
El Paso & Northeastern R. Co. <i>v.</i> Gutierrez, 215 U. S. 87; 30 Sup. Ct. Rep. 217 . . . . .	103, 105
Emerson <i>v.</i> Hall, 13 Peters, 409 . . . . .	242
Employers' Liability Cases, 207 U. S. 463, 495, 522; 28 Sup. Ct. Rep. 141, 159 . . . . .	34, 41, 135, 136, 137, 234
Erie R. Co. <i>v.</i> Russell, 183 Fed. Rep. 722 . . . . .	276, 296
Evey <i>v.</i> Railway, 81 Fed. Rep. 294 . . . . .	267
Exposition Cotton Mills <i>v.</i> Western & Atlantic R. Co., 83 Ga. 441 . . . . .	67
Ewald <i>v.</i> Chicago & N. W. R. Co., 70 Wis. 420 . . . . .	93

## F

Farwell <i>v.</i> Boston & Worcester Railroad Corporation, 4 Metc. 49 . . . . .	45, 46, 203, 274
Felt <i>et ux. v.</i> Denver & R. G. R. Co., 110 Pac. Rep. 215 . . . . .	278
Fletcher <i>v.</i> Baltimore & Potomac R. Co., 168 U. S. 135; 18 Sup. Ct. Rep. 35 . . . . .	94
Ft. Worth & D. C. Ry. Co. <i>v.</i> Whitehead, 6 Texas Civil Appeals, 595 . . . . .	80
Foster <i>v.</i> Neilson, 2 Pet. 253 . . . . .	263
Frisbie <i>v.</i> United States, 157 U. S. 160; 15 Sup. Ct. Rep. 586 . . . . .	189, 192
Fulgham <i>v.</i> Midland Valley R. Co., 167 Fed. Rep. 660	64, 132

## G

Galveston, H. & S. A. Ry. Co. <i>v.</i> Armstrong, 43 S. W. Rep. 614 . . . . .	78
Gibbons <i>v.</i> Ogden, 9 Wheat. 1, 189, 193, 198, 207, 208, 210, 211, 230 . . . . .	65, 71, 124, 134, 144, 152, 170, 191, 192, 234
Gilbert <i>v.</i> Burlington, C. R. & N. Ry. Co., 128 Fed. Rep. 529 . . . . .	276
Globe Refining Co. <i>v.</i> Landa Cotton Oil Co., 190 U. S. 540; 23 Sup. Ct. Rep. 754 . . . . .	236
Gloucester Ferry Co. <i>v.</i> Pennsylvania, 114 U. S. 203; 5 Sup. Ct. Rep. 826 . . . . .	145

## TABLE OF CASES

<i>Goldenstein v. Baltimore &amp; Ohio R. Co.</i> , 37 Washington Law Reporter, 2 . . . . .	164
<i>Gordon v. Toledo, St. L. &amp; W. R. Co.</i> , 177 Fed. Rep. 152	277
<i>Grand v. Ry. Co.</i> , 83 Mich. 564 . . . . .	288
<i>Great Western R. Co. v. Miller</i> , 19 Mich. 305 . . . . .	287
<i>Greene, In re</i> , 52 Fed. Rep. 104 . . . . .	74
<i>Greenlee v. Southern Ry. Co.</i> , 30 S. E. Rep. 115 . . . . .	276
<i>Gregory v. Hill</i> , 1869, 8th Sc. Sess. Cas., 3d Series, p. 282 . .	179
<i>Gulf, C. &amp; S. F. R. Co. v. Ellis</i> , 165 U. S. 150; 17 Sup. Ct. Rep. 255 . . . . .	218
<i>Gulf, C. &amp; S. F. R. Co. v. Fort Grain Co.</i> , 73 S. W. Rep. 845	74
<i>Gulf, C. &amp; S. F. R. Co. v. Hefley</i> , 158 U. S. 98; 15 Sup. Ct. Rep. 802 . . . . .	241
<i>Gulf, C. &amp; S. F. R. Co. v. Miami S. S. Co.</i> , 86 Fed. Rep. 407	80
<i>Gulf, C. &amp; S. F. R. Co. v. Texas</i> , 204 U. S. 403; 27 Sup. Ct. Rep. 360 . . . . .	78, 292
<i>Gundling v. Chicago</i> , 177 U. S. 183; 20 Sup. Ct. Rep. 633	197

## H

<i>Hall v. Chicago, R. I. &amp; P. Ry. Co.</i> , 149 Fed. Rep. 564 . . . . .	99
<i>Hallam v. Ry. Co.</i> , 80 Wis. 299 . . . . .	287, 288
<i>Hanley v. Kansas City Southern Ry. Co.</i> , 187 U. S. 617; 23 Sup. Ct. Rep. 214 . . . . .	76
<i>Harden v. No. Carolina R. Co.</i> , 40 S. E. Rep. 184 . . . . .	277
<i>Hayes v. Missouri</i> , 120 U. S. 68; 7 Sup. Ct. Rep. 350 . . . . .	217
<i>Head Money Cases, The</i> , 112 U. S. 580; 5 Sup. Ct. Rep. 247	263
<i>Herrick v. Railway</i> , 31 Minn. 1; 16 N. W. Rep. 413 . . . . .	266
<i>Higgins v. Central New England &amp; W. R. Co.</i> , 155 Mass. 176, 180 . . . . .	258
<i>Hohenleitner v. Southern Pacific Co.</i> , 177 Fed. Rep. 796 . .	277
<i>Holden v. Hardy</i> , 169 U. S. 366; 18 Sup. Ct. Rep. 383 . . . . .	161, 189, 193
<i>Holden v. Utah &amp; M. Mach. Co.</i> , 82 Fed. Rep. 209 . . . . .	236
<i>Hopkins v. United States</i> , 171 U. S. 578; 19 Sup. Ct. Rep. 40 . . . . .	151
<i>Horst v. Merkley</i> , 59 Fed. Rep. 502 . . . . .	236
<i>Houston D. Nav. Co. v. Insurance Co. of N. A.</i> , 32 S. W. Rep. 889 . . . . .	78

## TABLE OF CASES

17

<i>Hoxie v. New York, N. H. &amp; H. R. Co.</i> , 82 Conn.	352 . . . . .	133, 230, 265, 352
<i>Hudson v. Missouri K. &amp; T. R. Co.</i> , 16 Kan.	470 . . . . .	97
<i>Hutchinson v. York, N. &amp; B. R. Co.</i> , 5 Exch.	343 . . . . .	203

## I

<i>International &amp; G. N. Ry. Co. v. Elder</i> , 99 S. W. Rep.	856 . . . . .	277
<i>International Textbook Company v. Pigg</i> , 217 U. S. 91; 30 Sup. Ct. Rep. 481 . . . . .	30 . . . . .	70
<i>Interstate Commerce Commission v. Bellaire, Z. &amp; C. Ry. Co.</i> , 77 Fed. Rep. 942 . . . . .	77, 78, 80	
<i>Interstate Commerce Commission v. Chicago, K. &amp; S. R. Co. 81 Fed. Rep. 783</i> . . . . .	78	
<i>Interstate Commerce Commission v. Cincinnati N. O. &amp; T. P. Ry.</i> , 162 U. S. 184; 18 Sup. Ct. Rep. 700 . . . . .	75	
<i>Interstate Commerce Commission v. Detroit, G. H. &amp; M. Ry. Co.</i> , 167 U. S. 633; 17 Sup. Ct. Rep. 986 . . . . .	80	
<i>Interstate Commerce Commission v. Seaboard A. L. Ry. Co., 82 Fed. Rep. 563</i> . . . . .	78	
<i>Interstate Stock Yards Co. v. Indianapolis U. Ry. Co.</i> , 99 Fed. Rep. 472 . . . . .	99 . . . . .	77

## J

<i>Jackson v. Chicago, R. I. &amp; P. Ry. Co.</i> , 178 Fed. Rep.	432, 435 . . . . .	97
<i>Jacobson v. Massachusetts</i> , 197 U. S. 11; 25 Sup. Ct. Rep. 358 . . . . .	11 . . . . .	189, 194
<i>Joel v. Morrison</i> , 6 C. & P. 501 . . . . .	501 . . . . .	98
<i>Johnson v. Great Northern Ry. Co.</i> , 178 Fed. Rep.	643 . . . . .	87, 89, 113, 132, 277, 283
<i>Johnson v. Mammoth Vein Coal Co.</i> , 114 S. W. Rep.	722 . . . . .	277
<i>Johnson v. Southern Pacific Co.</i> , 196 U. S. 1, 17; 25 Sup. Ct. Rep. 158 . . . . .	1 . . . . .	40, 80, 119, 138, 277, 290, 294, 297, 298, 300, 307, 309, 310

## K

<i>Kansas City M. &amp; B. R. Co. v. Flippo</i> , 35 Southern Rep.	457 . . . . .	277
<i>Kansas City So. Ry. v. R. R. Com. of Arkansas</i> , 106 Fed. Rep. 359 . . . . .	359 . . . . .	76

## TABLE OF CASES

Kansas City So. Ry. Co. v. Quigley, 181 Fed. Rep. 190 . . . . .	117
Kelly v. Great Northern Ry. Co., 152 Fed. Rep. 211, 227 . . . . .	41, 42, 277
Kennedy v. Erie Railroad Co., Northern Dist. Ohio, Nov. 13, 1909 . . . . .	99
Kentucky Railroad Tax Cases, 115 U. S. 321, 337; 6 Sup. Ct. Rep. 57 . . . . .	217
Kilpatrick v. Grand Trunk Ry. Co., 74 Vt. 288; 52 Atl. Rep. 531 . . . . .	107
Knoxville Iron Co. v. Harbison, 183 U. S. 13; 22 Sup. Ct. Rep. 1 . . . . .	189, 194
Koehler, Ex parte, 30 Fed. Rep. 867 . . . . .	77
Krause v. Morgan, 53 Ohio St. 26 . . . . .	287

## L

Lake Superior & M. R. Co. v. United States, 93 U. S. 442 . . . . .	293
Lancer v. Anchor Line, 155 Fed. Rep. 433 . . . . .	151
Larabee v. New York, N. H. & H. R. Co., 66 N. E. Rep. 1032 . . . . .	277
Legal Tender Cases, 12 Wall. 457, 550, 551 . . . . .	159, 160
Lehigh Valley R. Co. v. Commonwealth, 18 Atl. Rep. 125 . . . . .	76
Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192; 12 Sup. Ct. Rep. 806 . . . . .	76
Lewis v. Pennsylvania R. Co., 69 Atl. Rep. 821 . . . . .	277
Little Miami R. Co. v. Stevens, 20 Ohio, 435 . . . . .	274
Live Stock Association v. Crescent City Co., 1 Abbott's U. S. Rep. 399 . . . . .	190
Lloyd v. North Carolina R. Co., 151 N. C. 536; 66 S. E. Rep. 604 . . . . .	116
Lochner v. New York, 198 U. S. 45; 25 Sup. Ct. Rep. 539 . . . . .	186
Lottery Cases, 188 U. S. 321, 356; 23 Sup. Ct. Rep. 321 . . . . .	150
Louisville & Nashville R. Co. v. Central Stock Yards Co., 212 U. S. 132; 29 Sup. Ct. Rep. 246, 248 . . . . .	294
Louisville & Nashville R. Co. v. Melton, 218 U. S. 36; 30 Sup. Ct. Rep. 676 . . . . .	208, 216
Louisville & Nashville R. Co. v. Mottley, 31 Sup. Ct. Rep. 265 . . . . .	196, 198
Lowell v. Boston & Lowell Railroad Corporation, 23 Pick. 33 . . . . .	244

## TABLE OF CASES

19

<i>Luken v. Lake Shore &amp; M. S. Ry. Co.</i> , 154 Ill. App. 550; 248 Ill. 377 . . . . .	277
<i>Lyon v. Charleston &amp; W. C. Ry. Co.</i> , 56 S. E. Rep. 18 .	277, 315
<b>M</b>	
<i>Magoun v. Illinois Trust &amp; Savings Bank</i> , 170 U. S. 283; 18 Sup. Ct. Rep. 594 . . . . .	212, 216
<i>Mallott v. Hood</i> , 66 N. E. Rep. 247 . . . . .	277, 291
<i>Martin v. Hunter, Lessee</i> , 1 Wheat. 334 . . . . .	253
<i>Martin v. Pittsburg &amp; L. E. R. Co.</i> , 203 U. S. 284; 27 Sup. Ct. Rep. 100 . . . . .	213
<i>Mason v. The Blaireau</i> , 2 Cranch, 240 . . . . .	267
<i>Maxwell v. Atchison, T. &amp; S. F. R. Co.</i> , 34 Fed. Rep. 286 .	236
<i>Mayfield v. Richards</i> , 115 U. S. 137; 5 Sup. Ct. Rep. 1177 .	262
<i>McLean v. Arkansas</i> , 211 U. S. 539; 29 Sup. Ct. Rep. 206 .	195
<i>McNamara v. Washington Terminal Company</i> , 35 App. D. C. 230 . . . . .	192
<i>McNeil, Ex parte</i> , 13 Wall. 236 . . . . .	253
<i>McNeil v. Southern Ry. Co.</i> , 202 U. S. 543; 28 Sup. Ct. Rep. 722 . . . . .	74, 294
<i>Milner v. Great Northern Ry. Co.</i> , 2 Minton-Senhouse Workmen's Compensation Cases, 51, 52 . . . . .	90
<i>Minneapolis &amp; St. Louis Ry. Co. v. Beckwith</i> , 129 U. S. 26; 9 Sup. Ct. Rep. 207 . . . . .	218
<i>Minneapolis &amp; St. Louis Ry. Co. v. Herrick</i> , 127 U. S. 210; 8 Sup. Ct. Rep. 1176 . . . . .	138, 218
<i>Minnesota Iron Co. v. Kline</i> , 199 U. S. 593; 26 Sup. Ct. Rep. 159 . . . . .	57, 213
<i>Mires v. St. Louis &amp; S. F. Ry. Co.</i> , 114 S. W. Rep. 1052 .	76
<i>Missouri, Kansas &amp; T. Ry. Co. v. New Era Milling Co.</i> , 101 Pac. Rep. 1011 . . . . .	78
<i>Missouri Pacific Ry. Co. v. Fitzgerald</i> , 160 U. S. 556, 583; 16 Sup. Ct. Rep. 389 . . . . .	259
<i>Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.</i> , 211 U. S. 612, 624; 29 Sup. Ct. Rep. 214, 218 . . . . .	294
<i>Missouri Pacific Railway v. Mackey</i> , 127 U. S. 205; 8 Sup. Ct. Rep. 1161 . . . . .	57, 138, 216, 218
<i>Mitchell v. Clark</i> , 110 U. S. 633; 4 Sup. Ct. Rep. 170, 312 . . . . .	159, 262
<i>Mitchell v. Crassweller</i> , 13 C. B. 235 . . . . .	98

## TABLE OF CASES

Mobile County <i>v.</i> Kimball, 102 U. S. 691 . . . . .	218
Mobile, J. & K. C. R. Co. <i>v.</i> Bromberg, 37 Southern Rep. 395 . . . . .	80, 277, 307, 308
Mobile, J. & K. C. R. Co. <i>v.</i> Turnipseed, 219 U. S. 35; 31 Sup. Ct. Rep. 136 . . . . .	213
Morier <i>v.</i> St. Paul, M. & M. R. Co., 31 Minn. 351; 17 N. W. Rep. 952 . . . . .	97
Morris <i>v.</i> Railway, 65 Iowa, 727; 23 N. W. Rep. 143 . . .	266
Moses Taylor, The, 4 Wall. 411, 429 . . . . .	250, 253
Moyer <i>v.</i> Peabody, 212 U. S. 78, 84; 29 Sup. Ct. Rep. 235 .	174
Mugler <i>v.</i> Kansas, 123 U. S. 623; 8 Sup. Ct. Rep. 273 . .	196
Muller <i>v.</i> Oregon, 208 U. S. 412; 28 Sup. Ct. Rep. 324 . .	197
Munn <i>v.</i> Illinois, 94 U. S. 113 . . . . .	172, 192
Munn <i>v.</i> People, 69 Ill. 80, 91 . . . . .	168
Murray <i>v.</i> Chicago & N. W. Ry. Co., 62 Fed. Rep. 24 . .	259
Murray <i>v.</i> Hoboken Land & Improvement Co., 18 How. 272	174
Myrtle <i>v.</i> Nevada C. & O. Ry. Co., 137 Fed. Rep. 193 . .	277

## N

Narramore <i>v.</i> Cleveland, C. C. & St. L. Ry., 96 Fed. Rep. 298, 300, 302 . . . . .	59, 165
New <i>v.</i> Baltimore & O. R. Co., 181 Fed. Rep. 698 . . . .	64
New Orleans Cotton Ex. <i>v.</i> Cincinnati, N. O. & T. P. R. Co., 2 I. C. C. Rep. 289 . . . . .	76
New York <i>v.</i> Erie R. Co., 198 N. Y. 369; 91 N. E. Rep. 849 .	115
New York Central R. Co. <i>v.</i> Lockwood, 17 Wall. 357 . .	162,
	171, 184
New York, N. H. & H. R. Co. <i>v.</i> Interstate Commerce Com- mission, 200 U. S. 361; 26 Sup. Ct. Rep. 272 . . . . .	187
Nichols <i>v.</i> Chesapeake & O. Ry. Co., 105 S. W. Rep. 481 .	277
Nicholson <i>v.</i> Transylvania R. Co., 138 N. C. 516; 51 S. E. Rep. 40 . . . . .	219
Norfolk & W. Ry. Co. <i>v.</i> Hazelrigg, 170 Fed. Rep. 551 . .	277
Norfolk & W. Ry. Co. <i>v.</i> Hazelrigg, 184 Fed. Rep. 828 . .	277
Norfolk & W. Ry. Co. <i>v.</i> Pennsylvania, 136 U. S. 114; 10 Sup. Ct. Rep. 958 . . . . .	75, 76
Norfolk & W. Ry. Co. <i>v.</i> United States, 177 Fed. Rep. 623 . . . . .	283, 290

## TABLE OF CASES

21

Northern Securities Co. v. United States, 193 U. S. 197; 24 Sup. Ct. Rep. 436 . . . . .	145
--	-----

## O

O'Brien v. Star Line, Limited, 1 Butterworth's Workmen's Compensation Cases, 177 . . . . .	97
Orient Ins. Co. v. Daggs, 172 U. S. 557; 19 Sup. Ct. Rep. 281 . . . . .	212
Owens v. Chicago G. W. Ry. Co. (Minn.), 128 N. W. Rep. 1011	273

## P

Pacific Coast Ry. Co. v. United States, 173 Fed. Rep. 448 . . . . .	75
Packet Company v. McCue, 17 Wall. 508 . . . . .	92
Parsons v. Chicago & N. W. Ry. Co., 167 U. S. 447; 17 Sup. Ct. Rep. 887 . . . . .	75
Patterson v. Bark Eudora, 190 U. S. 169; 23 Sup. Ct. Rep. 821 . . . . .	134, 194, 196
Patterson v. Kentucky, 97 U. S. 501 . . . . .	188, 189
Pederson v. Delaware, L. & W. R. Co., 184 Fed. Rep. 737 . . .	63
Peel Splint Coal Co. v. State, 15 S. E. Rep. 1000, 1006 . . . .	144
Peirce v. Van Dusen, 78 Fed. Rep. 693 . . . . .	216
Pelin v. New York C. & H. R. R. Co., 102 App. Div. 71; 115 App. Div. 883; 188 N. Y. 565 . . . . .	116
Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 9 . . . . .	71
People v. Welch, 141 N. Y. 273 . . . . .	265
Perkins v. Northern Pacific Ry. Co., 155 Fed. Rep. 445 . . .	78
Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123 . .	91,
	102, 103
Philadelphia & R. Ry. Co. v. Winkler, 56 Atl. Rep. 112 . .	277, 290
Pittsburg, C. C. & St. L. Ry. Co. v. Ross, 212 U. S. 560; 29 Sup. Ct. Rep. 688 . . . . .	209
Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577; 15 Sup. Ct. Rep. 415 . . . . .	151
Plummer v. Northern Pac. Ry. Co., 152 Fed. Rep. 206 . .	63, 277
Poli v. Numa Block Coal Company (Supreme Court of Iowa), 127 N. W. Rep. 1105 . . . . .	161

## TABLE OF CASES

<i>Porter v. St. Louis S. W. Ry. Co.</i> , 95 S. W. Rep. 453 . . .	78
<i>Potter v. Baltimore &amp; Ohio R. Co.</i> , 37 Washington Law Re- porter, 466 . . . . .	164

## R

<i>Railroad Commission Cases</i> , 116 U. S. 307; 6 Sup. Ct. Rep. 334, 348, 349, 388, 391, 1191 . . . . .	196
<i>Raisler v. Oliver</i> , 97 Ala. 714; 12 So. Rep. 238 . . . . .	265
<i>Reeves v. Railway</i> , 70 L. R. A. 513 . . . . .	266
<i>Rhodes v. Iowa</i> , 170 U. S. 412; 18 Sup. Ct. Rep. 664 . . .	79
<i>Rio Grande Southern R. Co. v. Campbell</i> , 96 Pac. Rep. 986 .	277
<i>Robb v. Connolly</i> , 111 U. S. 624, 637; 4 Sup. Ct. Rep. 544	259
<i>Robbins v. Shelby County Taxing District</i> , 120 U. S. 489; 7 Sup. Ct. Rep. 592 . . . . .	141
<i>Roberts v. Dunsmuir</i> , 75 Cal. 203; 16 Pac. Rep. 782 . . .	267
<i>Rosney v. Erie R. Co.</i> , 135 Fed. Rep. 311 . . . . .	80, 277
<i>Roush v. Great Northern Ry. Co.</i> , U. S. Circuit Court, E. Dist. of Washington, October 5, 1909 . . . . .	132

## S

<i>St. Louis Cordage Co. v. Miller</i> , 126 Fed. Rep. 495 . . .	277
<i>St. Louis, I. M. &amp; St. P. R. Co. v. Paul</i> , 173 U. S. 404; 19 Sup. Ct. Rep. 419 . . . . .	189
<i>St. Louis, I. M. &amp; S. Ry. Co. v. Conley</i> , 187 Fed. Rep. 949 .	132
<i>St. Louis, I. M. &amp; S. Ry. Co. v. Hesterly (Ark.)</i> , 135 S. W. Rep. 874 . . . . .	273
<i>St. Louis, I. M. &amp; S. Ry. Co. v. Neal</i> , 98 S. W. Rep. 958 . .	277
<i>St. Louis, I. M. &amp; S. R. Co. v. Taylor</i> , 210 U. S. 281; 28 Sup. Ct. Rep. 616, 618 . . . . . 62, 138, 277, 281, 310, 312	
<i>St. Louis, I. M. &amp; S. Ry. Co. v. York</i> , 123 S. W. Rep. 376 .	277
<i>St. Louis, M. B. T. Ry. Co. v. Callahan</i> , 194 U. S. 628; 24 Sup. Ct. Rep. 857 . . . . .	216
<i>St. Louis, S. W. R. Co. v. Harvey</i> , 144 Fed. Rep. 806 . . .	97
<i>St. Louis &amp; S. F. Ry. Co. v. Delk</i> , 158 Fed. Rep. 931 . . .	75, 277
<i>St. Louis &amp; S. F. R. Co. v. State</i> , 113 S. W. Rep. 203 . . .	76
<i>Saterlee v. Matthewson</i> , 2 Peters, 380 . . . . .	159
<i>Sawyer v. Commonwealth</i> , 182 Mass. 245 . . . . .	167
<i>Schlemmer v. Buffalo, R. &amp; P. Ry. Co.</i> , 205 U. S. 1; 27 Sup. Ct. Rep. 407 . . . . . 113, 119, 162, 277, 278, 290, 298, 310	

## TABLE OF CASES

23

Schlemmer v. Buffalo, R. & P. Ry. Co., 31 Sup. Ct. Rep.	561	286
Schuylar Nat'l Bank v. Bollong, 24 Neb. 827; 40 N. W. Rep.		
414		285
Seawell et al. v. Kansas City, Fort S. & M. R. Co., 24 S. W.		
Rep. 1002		77
Shelby Ice & Fuel Co. v. Southern Ry. Co., 60 S. E. Rep.	721	76
Sherlock v. Alling, 93 U. S. 99		148
Shohoney v. Quincy, O. & K. C. Ry. Co., 122 S. W. Rep.		
1025		277
Siebold, Ex parte, 100 U. S. 371		255
Siegel v. New York C. & H. R. R. Co., 178 Fed. Rep.		
873	277, 283,	301
Sigman v. Southern R. Co., 135 N. C. 184; 47 S. E. Rep.	421	219
Simon v. House, 46 Fed. Rep. 317		236
Slaughter-House Cases, 16 Wall. 36, 80		168, 189
Smeitzer v. St. Louis & S. F. R. Co., 168 Fed. Rep. 420		236
Smith v. Baker, 1891, Appeal Cases, L. R., H. of L. 325; 60		
L. J., Q. B. n. s. 683		104
Snead v. Central of Georgia Ry. Co., 151 Fed. Rep. 608	89,	277
Soon Hing v. Crowley, 113 U. S. 703; 5 Sup. Ct. Rep. 730		192
South Eastern Railway Company v. Railway Commissioners, 6 Q. B. D. 586		91
Southern Pacific Co. v. Allen, 106 S. W. Rep. 441		277
Southern Ry. Co. v. Carson, 194 U. S. 136		277
Southern Ry. Co. v. Simmons, 55 S. E. Rep. 459		277
Southwestern Oil Co. v. Texas, 217 U. S. 114; 30 Sup. Ct.		
Rep. 496		213
Spain v. St. Louis & S. F. R. Co., 151 Fed. Rep. 522, 527		151
Sprague v. Wisconsin Central Ry. Co., 116 N. W. Rep. 104		277
State Freight Tax Case, 15 Wall. 232, 275		146
State v. Chicago, St. P., M. & O. R. Co., 40 Minn. 267		76
State v. Southern Kansas Ry. Co. of Texas, 49 S. W. Rep. 252		78
Sternberger v. Cape Fear & Y. V. R. Co., 7 S. E. Rep. 836		76
Stewart v. Kahn, 11 Wall. 493, 505		261
Suttle v. Choctaw, O. & G. R. Co., 144 Fed. Rep. 668		277

## T

Taggart v. Republic Iron & S. Co., 141 Fed. Rep. 910	277
Taylor v. Manufacturing Co., 143 Mass. 470	288

## TABLE OF CASES

Teal <i>v.</i> Felton, 12 How. 284 . . . . .	248
Telegraph Co. <i>v.</i> Texas, 105 U. S. 460, 464 . . . . .	146
Texas & N. O. R. Co. <i>et al. v.</i> Sabine Tram Co., 121 S. W. Rep. 256 . . . . .	75, 77
Texas & P. Ry. Co. <i>v.</i> Avery, 33 S. W. Rep. 704 . . . . .	78
Texas & P. Ry. Co. <i>v.</i> Clark, 23 S. W. Rep. 698 . . . . .	78
Texas & P. Ry. Co. <i>v.</i> Davis, 54 S. W. Rep. 381 . . . . .	78
Texas & P. Ry. Co. <i>v.</i> Interstate Commerce Commission, 162 U. S. 197; 16 Sup. Ct. Rep. 666 . . . . .	78, 292
Texas & P. Ry. Co. <i>v.</i> Swearingen, 122 Fed. Rep. 193 . . . . .	277
Thompson <i>v.</i> Wabash R. Co., 184 Fed. Rep. 554 . . . . .	63
Thrussell <i>v.</i> Handyside, L. R. 20 Q. B. D. 359, 364 . . . . .	179
Toledo, St. L. & W. R. Co. <i>v.</i> Gordon, 177 Fed. Rep. 152 . .	277
Toledo, St. L. & W. R. Co. <i>v.</i> Sellars, 184 Fed. Rep. 855. . . . .	278
Tozer <i>v.</i> United States, 52 Fed. Rep. 917 . . . . .	75
Troxell <i>v.</i> Delaware, L. & W. R. Co., 180 Fed. Rep. 871, 876 . .	64
Troxler <i>v.</i> Southern Ry. Co., 32 S. E. Rep. 550 . . . . .	277
Tullis <i>v.</i> Lake Erie & W. R. Co., 175 U. S. 348; 20 Sup. Ct. Rep. 136 . . . . .	138, 209, 216

## U

Union Pacific Ry. Co. <i>v.</i> Brady, 161 Fed. Rep. 719 . . . . .	277
Union Pacific Ry. Co. <i>v.</i> Goodridge, 149 U. S. 680; 13 Sup. Ct. Rep. 970 . . . . .	189
Union Pacific Ry. Co. <i>v.</i> Wyler, 158 U. S. 285 . . . . .	67
Union Stock Yards Co. of Omaha <i>v.</i> United States, 169 Fed. Rep. 404 . . . . .	80, 293
United States <i>v.</i> Atchison, T. & S. F. Ry. Co., 163 Fed. Rep. 517 . . . . .	283, 289
United States <i>v.</i> Baltimore & Ohio R. Co., 184 Fed. Rep. 94 . . . . .	278
United States <i>v.</i> Boston & M. R. Co., 168 Fed. Rep. 148 .	313
United States <i>v.</i> Boyer, 85 Fed. Rep. 425 . . . . .	74
United States <i>v.</i> Central of Ga. Ry. Co., 157 Fed. Rep. 893	75
United States <i>v.</i> Chicago G. W. Ry. Co., 162 Fed. Rep. 775 .	291
United States <i>v.</i> Chicago, K. & S. Ry. Co., 81 Fed. Rep. 783 .	292
United States <i>v.</i> Chicago, M. & St. P. Ry. Co., 149 Fed. Rep. 486 . . . . .	74, 290
United States <i>v.</i> Chicago & N. W. Ry. Co., 157 Fed. Rep. 616	313

## TABLE OF CASES

25

<i>United States v. Colorado &amp; N. W. Ry. Co.</i> , 157 Fed. Rep. 321, 341, 342, 343 [Pet. for Certiorari], 209 U. S. 544; 28 Sup. Ct. Rep. 570 . . . . .	74, 75, 77, 78, 151, 292, 294
<i>United States v. Coombs</i> , 37 U. S. 72 . . . . .	77
<i>United States v. Delaware, L. &amp; W. R. Co.</i> , 152 Fed. Rep. 269	77
<i>United States v. Denver &amp; R. G. R. Co.</i> , 163 Fed. Rep. 519 .	283
<i>United States v. Erie R. Co.</i> , 166 Fed. Rep. 352 . . . . .	76, 283
<i>United States v. Freight Association</i> , 166 U. S. 290, 312; 17 Sup. Ct. Rep. 540 . . . . .	146
<i>United States v. Geddes</i> , 131 Fed. Rep. 542 . . . . .	74, 78, 292
<i>United States v. Great Northern R. Co.</i> , 145 Fed. Rep. 438 . . . . .	290
<i>United States v. Hall</i> , 98 U. S. 343 . . . . .	239
<i>United States v. Hopkins</i> , 82 Fed. Rep. 529 . . . . .	74
<i>United States v. Illinois Cent. R. Co.</i> , 177 Fed. Rep. 801 .	283
<i>United States v. Illinois Cent. R. Co.</i> , 180 Fed. Rep. 630 .	116, 117
<i>United States v. Illinois Term. R. Co.</i> , 168 Fed. Rep. 546 .	78
<i>United States v. International &amp; Great Northern R. Co.</i> , 174 Fed. Rep. 638 . . . . .	291
<i>United States v. Joint Traffic Association</i> , 171 U. S. 505, 573; 19 Sup. Ct. Rep. 25 . . . . .	187
<i>United States v. Ju Toy</i> , 198 U. S. 253, 263; 25 Sup. Ct. Rep. 644 . . . . .	174
<i>United States v. Lehigh Valley R. Co.</i> , 115 Fed. Rep. 373 .	77
<i>United States v. Lehigh Valley R. Co.</i> , 162 Fed. Rep. 410 .	283
<i>United States v. L. &amp; N. R. Co.</i> , 156 Fed. Rep. 193; 184 Fed. Rep. 99 . . . . .	184, 291, 313
<i>United States v. Norfolk &amp; Western Ry. Co.</i> , 184 Fed. Rep. 99 . . . . .	278
<i>United States v. Northern Pacific Terminal Co.</i> , 144 Fed. Rep. 861 . . . . .	80, 291, 292
<i>United States v. Pacific Coast Ry. Co.</i> , 173 Fed. Rep. 448, 453 . . . . .	77
<i>United States v. Philadelphia &amp; R. Ry. Co.</i> , 162 Fed. Rep. 403 . . . . .	283
<i>United States v. Pittsburgh, C. C. &amp; St. L. Ry. Co.</i> , 143 Fed. Rep. 360 . . . . .	80
<i>United States v. St. Louis, I. M. &amp; S. Ry. Co.</i> , 154 Fed. Rep. 516 . . . . .	291

## TABLE OF CASES

United States <i>v.</i> St. Louis Southwestern Ry. Co. of Texas, 184 Fed. Rep. 28 . . . . .	296
United States <i>v.</i> Southern Pacific Co., 169 Fed. Rep. 407, 409 . . . . .	283, 291
United States <i>v.</i> Southern Pacific Co., Kent's Index-Digest, 288 . . . . .	308
United States <i>v.</i> Southern Ry. Co., 164 Fed. Rep. 347 . . . . .	290, 295
United States <i>v.</i> Southern Ry. Co., 170 Fed. Rep. 1014 . . . . .	290
United States <i>v.</i> Southern Ry. Co., Kent's Index-Digest, 269 . . . . .	74, 75
United States <i>v.</i> Standard Oil Co., 155 Fed. Rep. 305 . . . . .	75
United States <i>v.</i> Toledo Terminal R. Co., Kent's Index- Digest, 283 . . . . .	290
United States <i>v.</i> Union Stock Yards Co. of Omaha, 161 Fed. Rep. 919 . . . . .	292, 293
United States <i>v.</i> Wabash-Pittsburgh Term. Ry. Co., Kent's Index-Digest, 285 . . . . .	313
United States <i>v.</i> Western & Atlantic R. Co., 184 Fed. Rep. 336 . . . . .	278
United States <i>v.</i> Wheeling & L. E. R. Co., 167 Fed. Rep. 198, 201 . . . . .	283, 290, 291
United States <i>v.</i> Wiley, 11 Wall. 508 . . . . .	262
United States <i>v.</i> Winn, 3 Sumner, 209 . . . . .	119

## V

Voelker <i>v.</i> Chicago, M. & St. P. Ry. Co., 116 Fed. Rep. 867; 129 Fed. Rep. 522 . . . . .	66, 277, 291
---	--------------

## W

Wabash R. Co. <i>v.</i> Bhymer, 214 Ill. 579 . . . . .	67
Wabash R. Co. <i>v.</i> United States, 168 Fed. Rep. 1 . . . . .	80, 290,
	291, 295, 307
Wabash R. Co. <i>v.</i> United States, 172 Fed. Rep. 864 . . . . .	283
Walsh <i>v.</i> New York, N. H. & H. R. Co., 173 Fed. Rep. 494 . . . . .	128, 128, 132
Walsh <i>v.</i> Whiteley, 1888, L. R. 21 Q. B. Div. 371, 374 . . .	29
Watson, Admx., <i>v.</i> St. Louis, I. M. & S. Ry. Co., 160 Fed. Rep. 942 . . . . .	39, 64, 132, 151, 283

## TABLE OF CASES

27

West End Improvement Club <i>v.</i> Omaha & C. B. Ry. Co., 17 I. C. C. Rep. 239 . . . . .	83
Western Union Tel. Co. <i>v.</i> Pendleton, 122 U. S. 347, 356; 7 Sup. Ct. Rep. 1126 . . . . .	72
Wilcox <i>v.</i> Consolidated Gas Co., 212 U. S. 19; 29 Sup. Ct. Rep. 192 . . . . .	196
Wilcox <i>v.</i> Luco, 118 Cal. 642; 45 Pac. Rep. 676; 50 Pac. Rep. 758 . . . . .	265
Willson <i>v.</i> Rock Creek R. Co., 7 I. C. C. Rep. 83 . . . . .	83
Wilson <i>v.</i> Merry, 19 L. T. Rep. n. s. 30; L. R. 1 Scotch App. 326 . . . . .	227
Winfrey <i>v.</i> Northern Pacific Ry. Co., 164 Fed. Rep. 698 . 99, 133	
Wisconsin <i>v.</i> Chicago, M. & St. P. Ry. Co., 136 Wis. 407; 117 N. W. Rep. 686 . . . . .	117, 295
Woodley <i>v.</i> Metropolitan District R. R. Co. (1877), L. R. 2 Exch. Div. 384 . . . . .	179

## Y

York <i>v.</i> St. Louis, I. M. & S. Ry. Co., 110 S. W. Rep. 803 . . . . .	277, 278
---	----------

## Z

Zeigler <i>v.</i> Danbury & Norwalk Railroad Company, 52 Conn. 543, 556 . . . . .	275
Zikos <i>v.</i> Oregon L. & N. Co., 179 Fed. Rep. 893 . . . . .	85, 132

"The Courts cannot abolish the old rules and adopt others which shall suit existing facts and remedy existing evils. That must be done by the legislature. But when tardy statutes are promulgated, the Courts should interpret them as favorably as their terms will allow, and not proceed to shackle them with the discredited common law manacles."

*CASPAR v. LAWRENCE et al.*, 109 *Pacific Reporter*, 667.

# **LIABILITY OF RAILROADS**

**TO**

## **INTERSTATE EMPLOYEES**

### **INTRODUCTION**

THERE are two schools of thought as to the construction to be given to enactments relating to masters and workmen. One may be called the property view and the other the humane view. One regards principally the interest of the property owner; the other regards the rights of the workman as a man.

In a note to 47 L. R. A. 171, Mr. C. B. Labatt says that "it is possible to regard the social and economic relations between the parties to a contract of service from two points of view which are fundamentally and essentially different." And he quotes Lord Esher, in *Walsh v. Whiteley*, 1888, L. R. 21 Q. B. Div. 371, 374. "There have always been, I think, two schools of thought in relation to cases of this kind. . . . The view of one school has been that, in order to prevent injustice to masters, the construction of these enactments relating to masters and workmen should be nar-

rowed, and that they should be construed as strictly as possible." The view of the other school is that master and workman are not really on an equal footing."

Mr. Labatt further points out the alignment of these two theories. "The theory of the former of the schools here mentioned is based on the supposed mobility of labor, and involves the conclusion that a servant is perfectly free to accept, remain in, or abandon an employment of which he knows some particular risk to be an incident. . . .

"According to the alternative theory, based on the actual facts of everyday life in civilized countries, no real freedom can be predicated on the acts of any one who must take his chances in a labor market which, under normal conditions, is constantly glutted, and in times of unusual stress is 'thronged with suitors' to such an extent that a man of average capacity is fully justified in believing that if he declines an offered situation, or leaves one which he holds, he will be exposing himself and those dependent on him to a really serious danger of destitution."

That such conflicting schools of thought exist is manifest in our decisions, and the existence of two such contradictory theories of interpretation presents an interesting and important question in progressive legislation.

The question often is, not as to what the Constitution may say upon the subject, nor as to the manifest legislative purpose of the enactment in question, but as to the point of view from which its consideration will be approached. What is the school of economic thought of the court which is to pass upon the question? Which "school of thought" will prevail?

If, in these pages, the writer has seemed to err in considering the subject from the "alternative view," it is for the reason that he believes the courts have come to realize that it is no longer wise to lend support to the idea that workmen cannot find redress for their grievances in the courts. Mr. Justice Brewer, delivering the opinion of the court in the case of *In re Debs, petitioner*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, said: ". . . it is a lesson which cannot be learned too soon or too thoroughly, that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot box."

Now, when legislation is enacted in pursuance of the method suggested by the court, it is not likely that our highest court will find itself so enamored of the common-law rules which this legislation abrogates as to declare it unconstitutional or to emasculate it by a narrow construction of its terms.

The day seems to be dawning when our courts

will listen in patience to an appeal based upon the right of workmen to recover for injuries received by them while in the performance of their duty to those who thrust upon them all the dangers of their common enterprise.

But the "property school" of judicial thought is far from yielding up the field to the modern and more humane view. It is supported by keen intellects at the bar. The leading railroad counsel of the country have had conferences and have unitedly made preparation for the litigation to test the constitutionality of the Federal Employers' Liability Act of June, 1908.

The Report of the Committee appointed at the conference of railroad counsel held at Atlantic City, N. J., July 13, 14 and 15, 1908 to consider this subject contains an able statement of the objections urged by the railroads against this legislation, and a concise and vigorous review of the authorities tending to support their contention that this law is unconstitutional. The railroads are well prepared and fortified for the contest.

Congressional action in abolishing the fellow-servant doctrine in its application to deaths and injuries of employees of interstate railroads is due to the growing public sentiment that this particular rule of the common law is unjust. Economists, publicists, and statesmen on both sides of the

Atlantio have long condemned the doctrine. Public opinion does not to-day subscribe to any of the grounds put forward in its defense.

The cry for a change was regarded by many courts as only the clamoring of the demagogue. They discouraged negligence *cases*, and the *negligence* flourished at the expense of the industrial toilers.

While hair-splitting in the courts defeated the victims of industrial accidents, the crippling and killing of workmen continued at a rapid pace.

Legislation was, therefore, necessary to establish as a principle of public policy the obligation of society to provide for those who are injured in the maintenance of its industries. Some of the States passed remedial legislation to remove the injustice of the fellow-servant rule. But the judicial interpretation of these statutes, in most cases, deprived them of their vigor. Courts found a "voluntary assumption of risk," and took cases from juries on the ground of "contributory negligence" in many instances where a brave performance of dangerous service solely for the employer's advantage was the only fault attributable to the injured workman. Fidelity was punished as a fault. Our judicial decisions denying justice to workmen will be severely criticised by the future historian.

When the appeal was made for federal legis-

lation, Congress was in no haste to act. Although federal power over the subject was limited to a narrow range, that is, to employees engaged in interstate commerce, it was nearly twenty years after the first bill was introduced before any law was enacted by the national legislature. The first enactment on the subject, that of June 11, 1906, 34 Stat. L., 232, c. 3073, was held unconstitutional by the Supreme Court. *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. Rep. 141.

After this decision President Roosevelt, on March 25, 1908, sent to Congress a message in part as follows:

"I renew my recommendation for the immediate re-enactment of an Employers' Liability Law, drawn to conform to the recent decision of the Supreme Court. Within the limits indicated by the court, the law should be made thorough and comprehensive, and the protection it affords should embrace every class of employee to which the power of Congress can extend. . . .

"It is a reproach to us as a nation that in both federal and state legislation we have afforded less protection to public and private employees than any other industrial country of the world."

Congress thereafter passed the Act of April 22, 1908, 35 Stat. L. 65, c. 149, which, as amended by the Act of April 5, 1910, 36 Stat. L. 291,

c. 143, is now the law as to cases arising between railroads engaged in interstate commerce and their interstate employees. It has been held that this law superseded and renders inoperative all remedies heretofore existing by the laws of the States as to actions against interstate railroads for the death or injury of their interstate employees.

It will, therefore, be seen that the federal law is the only law which can be relied upon for a recovery for injuries to the interstate employees of an interstate railroad. Most railroads are engaged in interstate commerce. Most of the employees of an interstate railroad are themselves engaged in interstate commerce. It is manifest, therefore, that most of the suits against railroads for personal injuries to employees must be governed by the federal law, if its constitutionality is sustained.

Questions in relation to its constitutionality and interpretation are, therefore, of interest to the profession. An attempt to formulate these questions and to give consideration to their weight and effect will be made in the following pages.



## PART ONE

### THE EMPLOYERS' LIABILITY ACTS

#### CHAPTER I

##### EMPLOYERS' LIABILITY ACTS OF 1908 AND 1910

###### § 1. SUMMARY.

In actions for death or personal injuries suffered by any employee of a common carrier by railroad, when both employee and the carrier are engaged in either foreign, interstate, or territorial commerce, or commerce in the District of Columbia, the Act, as amended April 5, 1910,

(a) totally abolishes the defense heretofore permitted under the fellow-servant doctrine;

(b) authorizes an action where such death or injury arises by reason of any defect or insufficiency in the cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment of such carrier, due to its negligence;

(c) totally abolishes the application to such actions of the doctrines of "assumption of risk" and "contributory negligence," where the violation by the carrier of any statute enacted for the safety of employees contributed to the casualty;

(d) permits recovery in any action brought

under the statute notwithstanding contributory negligence of the plaintiff, but requires the jury to deduct from the damages such proportion thereof as may be attributable to the contributory fault of the employee;

(e) forbids "contracting out" of the liability created by the statute;

(f) requires the deduction from damages of any sum employee has received from any insurance or indemnity fund to which his employer has contributed;

(g) permits action to be brought in either the federal or state courts;

(h) prohibits removal to federal court of an action under the statute begun in a state court;

(i) authorizes suit to be brought in the United States Circuit Court for the district in which the cause of action may arise, or in which the defendant may reside or be doing business;<sup>1</sup>

(j) authorizes suit for death;

(k) permits survival of action but provides that

<sup>1</sup> By the terms of the Judicial Code, approved March 3, 1911, and in effect on and after January 1, 1912, the Circuit Courts of the United States are abolished, and by Chap. 13, Section 291 thereof the powers and duties heretofore exercised by the Circuit Courts are transferred and imposed upon the United States District Courts. Article 8, Section 24 of the Judicial Code confers upon the District Courts jurisdiction "of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings of which exclusive jurisdiction has been conferred upon the Commerce Court."

there shall be only one recovery for the same injury;

(l) fixes no statutory limit upon the amount of damages recoverable; and

(m) permits no action under the Act unless commenced within two years from the date the cause of action accrues.

## § 2. CONGRESSIONAL INTENT.

The legislative purpose and intent in the enactment of the Act of Congress approved April 22, 1908, 35 Stat. L. 65, c. 149, generally referred to as the Employers' Liability Act, cannot be stated better than in the language of District Judge Trieber in his decision in the case of *Watson, Admx. v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942: "The object of Congress in the enactment of the law was to protect the men employed in this hazardous occupation in which thousands are annually killed or maimed without any fault of the master himself, but by the negligence of other employees, over whom the servant has no control and in whose selection he had no voice. The legislation is neither new nor revolutionary. It has been recommended by President Roosevelt in his annual message in 1905 and again in a special message on January 31, 1908. A similar Act was passed by the English Parliament as early as 1880, and among the States of the Union a large

number have either abolished the fellow-servant rule entirely or modified it materially in respect to employees engaged in hazardous occupations, many of them limiting the change to railroads. . . . Similar statutes have also been for a long time in force in most of the continental states of Europe. This evidences that such legislation is in compliance with the demands of an enlightened public opinion. To effect that purpose it is wholly immaterial what the employment of the fellow-servant is. Public opinion, as expressed through the legislative departments of the nation, as well as many of the States, evidently considered it an injustice that persons injured, or, in case of death, the surviving members of the family should become burdens on the public and objects of charity, and therefore considered it better public policy that the employer should be required to make some provision for them, charging the moneys thus expended to expenses of management or cost of production, and collect it indirectly from the public. The enactment of such a statute not only results in protecting the employees of carriers by rail, but at the same time guards the public welfare by securing the safety of travelers. The latter is one of the reasons mentioned by the court in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 17, 25 Sup. Ct. Rep. 158, involving the Safety Appliance Act. As stated by Mr. Justice Moody,

in his dissenting opinion in the *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. Rep. 159, 'Any law which promotes the safety of either [meaning the employee or passengers] promotes the safety of both.'

"That provisions for the safety of the employees of a railway, if not directly at least indirectly, add to that of the passengers cannot be doubted. The knowledge of the fact that in case of an accident some provision will be made for him in case of disability, or for the family dependent upon him if death results from the injury, relieves the employee's mind to that extent of the anxiety incidental to the fear entertained by every man, and especially if he has a family dependent upon his earning, as to what would become of them if he become helpless or be killed. This anxiety ever present to those engaged in such a hazardous occupation as that of railways propelled by the dangerous agency of steam may materially affect the safety of the passengers entrusted to them in an emergency in which cool judgment is so essential. By making this provision for him, legislators might well have reasoned that the safety of the passengers is as much promoted as that of the employee."

It was well said by District Judge Morris in his interpretation of the former federal employers' liability law in the case of *Kelly v. Great Northern*

*Ry. Co.*, 152 Fed. Rep. 211, 227, that Congress ". . . enacted the statute . . . and by its provisions changed certain common-law rules determining liability in order to promote that object [the protection of the lives and persons of employees] by securing, so far as the statute could compel it, a more careful selection of employees, a closer and more careful supervision of them and a more rigid enforcement of their duties."

### § 3. REPORT OF SENATE JUDICIARY COMMITTEE.

A new public policy is declared for this class of cases. As was said by the Judiciary Committee of the Senate in Report 432, 61st Congress, 2d Session, March 22, 1910, on page 2: "The passage of the original Act and the perfection thereof by the amendments herein proposed, stand forth as a declaration of public policy to change radically, as far as congressional power can extend, those rules of the common law which the President in a recent speech at Chicago characterized as 'unjust.' President Taft in his address at Chicago, September 16, 1909, referred to 'the continuance of unjust rules of law exempting employers from liability for accidents to laborers.'

"This public policy which we now declare is based upon the failure of the common-law rules as to liability for accident to meet the modern industrial conditions, and is based not alone upon

the failure of these rules in the United States, but their failure in other countries as well. Mr. Asquith, present prime minister of England, said that it was 'revolting to sentiment and judgment that men who met with accidents through the necessary exigencies of daily occupation, should be a charge upon their own families.'

"The passage of the law was urged upon the strongest and highest considerations of justice and promotion of the public welfare. It was largely influenced by the strong message of President Roosevelt to the Sixtieth Congress in December, 1907, in which the basis of the legislation was clearly and strongly placed upon the ground of justice to the railroad workmen of this country and in which legislation was urged to the limit of congressional power upon this subject. In the message President Roosevelt said :

"'The practice of putting the entire burden of loss to life or limb upon the victim or the victim's family is a form of social injustice in which the United States stands in unenviable prominence. In both our federal and our state legislation we have, with few exceptions, scarcely gone farther than the repeal of the fellow-servant principle of the old law of liability, and in some of our States even this slight modification of a completely outgrown principle has not yet been secured. The legislation of the rest of the in-

dustrial world stands out in striking contrast to our backwardness in this respect. Since 1895 practically every country in Europe, together with Great Britain, New Zealand, Australia, British Columbia, and the Cape of Good Hope has enacted legislation embodying in one form or another the complete recognition of the principle which places upon the employer the entire trade risk in the various lines of industry.'"

## CHAPTER II

### FELLOW-SERVICE, CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

#### § 4. FELLOW-SERVANT DOCTRINE. IN GENERAL.

Under the rules of the common law as established by a long line of judicial decisions, no employee can recover from his employer for a personal injury received in the course of his employment and caused by the negligence of any other employee who is engaged in the service of the common master of both, where both the injured employee and the one causing the injury derive authority and compensation from the same source.

Or, stated in another way, one who enters the employ of another assumes the risk of all the manifest perils of such employment, including the peril of injury by the negligence of any employee engaged in the same common employment.

#### § 5. BASIS OF FELLOW-SERVANT DOCTRINE.

This exemption of the employer from liability for injuries to employees has been based on various grounds.

a. *Perils Compensated for in Wages.* — Chief Justice Shaw, in the case of *Farwell v. Boston & Worcester*,

*ter Railroad Corporation*, 4 Metc. 49, says that ". . . he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. . . . They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others."

That the perils may be "distinctly foreseen" and are "incident to the service" gives us no light upon the right of a judicial tribunal to relieve the operators of a business in which such perils inhere from any obligation to compensate for injuries incident to the service which they have instituted. In other words, the fact that the perils are "incident to the service" should not relieve those who institute the service to which such perils are incident, and cast their burdens upon those whose labor is necessary to the carrying on of the enterprise of which the perilous service is a part.

But let us examine the proposition that the risk may be assumed to be "provided for" in the rate of compensation. By the use of this expression it may be inferred that Chief Justice Shaw intended that the enterprise should bear the burden

of the "risk," and that it should be "provided for in the rate of compensation." In other words, it is a fair construction of this expression by Chief Justice Shaw that the rate of compensation should be such as to compensate *all* for the "risk" of injury to *some*. His suggestion of compensation for the risk, logically carried out, would compensate in increased wages for "risk" all who incurred the risk. This increase, if compensatory — and he suggests the compensatory idea — would be equal to a sum which would compensate for the injuries of those who actually suffered.

The rule of compensation for risk is less logical than the rule of compensation for injury. But if it were carried out, the burden upon the enterprise would be the same in each case. It would be much more logical to pay every man in wages only for the services he renders, and to compensate for injuries incident to the service only those who meet with injury.

But the assumption that all are paid, for "risk" is a pure judicial assumption without any foundation in fact.

"Wages are not relatively higher in the most dangerous trades." Report to the Legislature of New York, March 19, 1910, of the Commission appointed by Governor Hughes to Inquire into the Question of Employers' Liability, page 7.

And even if wages beyond the standard of com-

pensation for *service* were fixed to compensate for *risk* of injury, it would be less logical than the rule recognized by Congress that those who institute a service in which perils lurk should bear the burdens which result from such perils.

To refuse compensation to those who are *actually overtaken* by the risk, because all are presumed to be compensated for the risks by which they *may be overtaken*, is not creditable to any system of jurisprudence.

b. **Employee Voluntarily Assumes the Risk.** — Over and over again our jurists have asserted that workmen "voluntarily assume the manifest perils of their employment." In fact, no such voluntary assumption exists. There is nothing voluntary about it on the part of workmen. On the contrary, it is a clear case of judicial compulsion. Wherever and whenever in *any* line of work a toiler undertakes to *sell his services*, the courts compel him, under the rules of the common law, to place his life and limb, without requital, at the jeopardy of the manifest perils of the employment, including the risk of injury from negligence of fellow employees. In no employment he seeks can he escape this burden placed upon him by the courts. His volition is not material. If there is any logical presumption arising from such a state of facts, it is that he objects and is unwilling to have this burden cast upon him. As this burden is

manifestly prejudicial to him, the legal presumption ought to be that it is *involuntarily* borne by him, because in no manner can he escape from the burden of the rule laid down by the courts.

Without regard to the intention of the parties, without regard to the natural disinclination of any workman to assume such a burdensome obligation and one so prejudicial to his interests, the courts have "implied" this obligation in every contract of employment.

The rule is a pure fiction. It has no basis but that of judicial implication. By this fiction, judicially created for the purpose of assigning a reason for the discrimination, workmen have been differentiated from all other individuals. And yet to relieve this harsh, coercive, and discriminating rule of the appearance of injustice, its creators and defenders speak of it as "voluntary" on the part of workmen. The rule denies equality of right to those whose rights should be most zealously guarded by the courts.

The fiction of "assumption of risk" follows the workman into any and all occupations where he enters the service of another.

As he *must* assume the risk, not by his own volition, but by the mandate of the courts, it is, to say the least, misleading to refer to this doctrine as a "voluntary assumption of risk." "The

law should commend itself to the plain sense of men for its reasonings as well as its rulings."

Courts cannot disclaim the knowledge that workmen not only do not "voluntarily" assume the risks of bodily injury, but everywhere protest against being *compelled* to assume such risks.

The learned author of Ruegg's 'Employers' Liability and Workmen's Compensation, 8th edition, page 16, under the caption "Common Employment founded on Unsound Reasoning," says, "It is not difficult to discover the unsoundness of such a system of reasoning. The workman makes no contract to take the consequences of the negligence of his fellow workmen; he would be generally very unwilling to do so.

"The only ground for implying such assent is, that he has entered into association with others upon work, in the course of which he knows there is risk of injury arising from the negligence of those with whom he thus places himself in contact. If from this knowledge of a risk a contract to exclude the principle of *respondeat superior* is to be implied, then it should be implied in the case of passengers upon railways and other public conveyances, and indeed in the case of every one who voluntarily subjects himself to the ordinary dangers of street traffic."

The Commission appointed to inquire into the Question of Employers' Liability, in its report

to the legislature of New York, March 19, 1910, page 13, says in regard to assumption of risk: "The decisions of our courts as to the intricacies and refinements of the doctrine have been most unsatisfactory. The doctrine has grown gradually into the present common law in the last sixty years to be a series of judicial decisions. . . . The courts choose to say that there is an 'assumption' of the risk, or an 'implied contract,' but in the ordinary case that is merely a form of words which the rule of law happens to take.

"The real fact is, that there is usually no contract between the employer and the workman concerning it, even in the hazardous trades. . . . As a matter of fact, however, under modern industrial conditions the individual workman consents and assumes the risk only because in the ordinary case he has no option to do anything else."

**c. Public Policy.** — Public policy is sometimes given as the basis of the rule. Public policy, however, dictates that responsibility for industrial accidents shall be so placed as to decrease their volume.

The courts have held railroads to a high degree of responsibility for accidents to passengers. Thus passengers have been protected and safeguarded.

The courts have relaxed responsibility and have exercised refinements in reasoning to relieve from responsibility where employees were concerned.

Thus accidents to employees have been promoted till their increasing volume is a national scandal.

In the Bulletin of the United States Bureau of Labor, for September, 1908, it is said that upon a conservative estimate, the total mortality from accidents in the United States among adult male wage earners is between thirty thousand and thirty-five thousand. . . . In addition there were approximately not much less than two million non-fatal accidents, that not only involve a vast amount of human suffering and sorrow, but materially curtail the normal longevity among those exposed to the often needless risk of industrial casualties.

These remarkable official figures demonstrate that the common-law rule has failed to accomplish its purpose of minimizing the volume of accidents by requiring a community of diligence on the part of all the actors in industrial enterprise.

As said by Mr. Labatt, Master and Servant, vol. 2, page 1325: "If, in countries where the doctrine of common employment has been more or less circumscribed, none of the evil results which it is declared to have obviated can be detected, it may be safely concluded that no harm would have been produced if the doctrine had never been applied, and that no harm will result if it should be entirely abrogated by the legis-

latures,—the only authority by which such a change in the law can now be effected."

**d. Risk of Injury is an Obvious Risk of the Employment.**—It is often urged that the risk of injury is an obvious risk of the employment. But why place on those least able to bear it the consequences of risk, which is a part of a gainful enterprise launched with full knowledge of its perils?

The owners who have instituted a business, knowing that it is obviously perilous, should bear the burden of accidents which may result to those whom they have invited as assistants in the enterprise.

The dangers are initiated by the employer. They grow out of his enterprise. They are affected by his methods. They arise from the use of his instrumentalities. They may be largely controlled by his power.

The workman is powerless over the causes of the accidents which overwhelm him.

Though the risk be obvious, no effort of the workman can relieve him from the perils. He is not employed to find methods to escape from the perils of his employment. He is employed to work at a designated task. He has no time to devise safeguards. That is the master's duty.

A law founded in justice should place responsibility where the power and authority exist to

safeguard from perils, not upon those whose means and opportunity are unavailing to prevent the dangers which are obvious.

The perils are incident to the *master's* business. That they are obvious is no reason for his relief from their consequences.

e. **Saving of Industry from being Overburdened.** — The Commission, heretofore mentioned, in its report to the Legislature of New York, says of the common-law system that "its development was profoundly influenced by the belief of the courts that the necessity of profit in industrial enterprises demanded protection, even at the expense of damage to certain individuals."

This is the reason which leads to the attempt to find other reasons. Underlying all the reasons given for the rule by its defenders is a motive to free industry from the consequences of the perils incident to its maintenance.

The defenders of the fellow-servant and kindred doctrines will not permit industry to suffer, though men may suffer and die unrequited.

"The right to life is the highest right." No jurist can for the protection of the right of an industry to live justify the abrogation of a man's right to live.

Nor should a man be denied redress if crippled without his fault merely because an industry or a business may in consequence be crippled. In-

dustry should pay the toll it takes in life and limb.

*f. Theory that Rule Tends to make Employees more Watchful of Each Other.* — It has been suggested as a defense of the fellow-servant doctrine that "it tends to make each servant more watchful of his fellows, and thus to promote the safety of all as well as the efficiency of their common work." This contention was well answered by Dr. Francis Wharton, in an article in the III Southern Law Review, 730, December, 1877, in which he said: "Does the operative in one case out of a hundred of those that come before the court have the opportunity to inspect his associates? Is he not, by the laws of all difficult and important industries, so tied to his post that he has no time for such observations? Even supposing that he has time, has he the means or capacity? He is in another part of the same building; or he is in a different building; or, while he is driving a locomotive, his fellow-operative by whose negligence he is to be injured is turning a distant switch the wrong way; or, while he is waiting to couple, his fellow-operative neglects to put on the brakes; or, while he is so busy cleaning the deck of a great steamer, his fellow-operative is so negligently managing the boiler that it bursts. Even if my fellow-servant stands by my side, I may be incapable,

from my ignorance of his specialty, of criticising him; or his superiority in experience may be such to make me distrust my capacity for criticism. It is absurd to speak of the sufferer, in such cases as these, inspecting and reporting on the offender's misconduct. And it is still more absurd to make such a supposition when the offender is the sufferer's superior, or when the subaltern knows that if he reports the negligences of his superiors he will soon be without superiors to report. We have, therefore, to reject the idea that the exemption before us rests upon the fact that the sufferer, in cases of this class, had the opportunity, before the injury, of observing and reporting on the conduct of the person by whom he is to be injured."

In condemning the fellow-servant rule, Labatt, Master and Servant, vol. 2, page 2107, declares that it "does not rest upon any satisfactory basis, logical, social, or economic."

A similar criticism of the doctrines was voiced by Mr. Asquith in the House of Commons, May 18, 1897, Parliamentary Debates, 4th Series, Vol. XLIV, in which he said: "Seventeen years ago, when the first Employers' Liability Bill was passed, the doctrine of common employment was taken for granted by everybody as being a sound and well-founded principle, and it was regarded as rather a heretical thing to throw doubt upon it.

But now there is no one so poor as to do it reverence."

#### § 6. THE INTENT OF THE ACT CLEARLY TO ABROGATE THE FELLOW-SERVANT DOCTRINE.

In cases arising on railroads engaged in interstate traffic Congress has, by the Employers' Liability Act of 1908, absolutely rejected the fellow-servant rule, and in its place has created a remedial action conferring a remedy upon employees where the common law denied it. And to this statute the reasoning upon which the common law was sustained should in no manner be applied.<sup>1</sup>

<sup>1</sup> The Justices of the Supreme Judicial Court of Massachusetts on July 24, 1911, in an opinion in response to the request of the Massachusetts Senate as to the validity of a bill, since enacted, known as the Workmen's Compensation Act (Chapter 751 of the Acts of 1911), said in relation to the first section of said Act which abolished the common law defenses of contributory negligence, fellow service and assumption of risk in damage suits for death or injury to employees in the course of their employment: "The rules of law relating to contributory negligence and assumption of risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the Legislature may change them or do away with them altogether as defenses (as it has to some extent in the employer's [liability] act) as in its wisdom in the exercise of powers entrusted to it by the Constitution it deems will be best for the 'good and welfare of this Commonwealth.' See *Missouri Pacific Railway v. Mackey*, 127 U. S. 205; *Minnesota Iron Co. v. Kline*, 199 U. S. 593. . . . Construing the section as we do and as we think that it should be construed, it seems to us that there is nothing in it which violates any rights secured by the State or Federal Constitutions."

The Act is remedial. In construing legislation of this character, the rule is that the interpretation shall be broad and liberal in order to carry out the legislative intent. No exception, qualification, or condition which may in any manner limit or control the general words of the Act itself is to be read into the rule laid down by the legislature. Where there is any degree of fault upon the part of "any employee" from which, "in whole or in part," a casualty results to any other employee, a remedy therefor is given by the Act.

There is no apparent room for any judicial interpretation which may limit or control the general language and purpose of the Act, in all cases within its scope, to abrogate the defense of common employment.

#### § 7. ACT RESTRICTS APPLICATION OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

The intent of Congress to exact the highest degree of care on the part of the railroads is indicated by the provision of the Act that, in any case where any statute enacted for safety of employees is violated, the railroad is deprived of the defenses of assumption of risk and contributory negligence.

Thus, all such safety statutes are given greater efficacy because of the accountability arising from

their violation. The stringent liability established by this statute has a manifest tendency to sustain and enforce every statute enacted for the safety of employees and travelers. On this point Judge Taft, in *Narramore v. Cleveland, C. C. & St. L. Ry.*, 96 Fed. Rep. 298, 300, in speaking of a statute of Ohio requiring railroad companies, under penalty of a fine, to block the frogs, switches, and guard rails on their tracks, said:

"The expression of one mode of enforcing it did not exclude the operation of another, and in many respects *more efficacious* means of compelling compliance with its terms, to wit, the *right of civil action* against a delinquent railway company by one of the class sought to be protected by the statute for injury caused by a failure to comply with its requirements."

A remedy is also given by the Act where the casualty alleged resulted "in whole or *in part*" "by reason of *any* defect or insufficiency" in "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or *other* equipment" of the railroad, "due to its negligence."

In no case arising under the statute is contributory negligence to be an absolute bar to recovery as at common law. In case there has been no violation of a statute, but there has been negligence on the part of the plaintiff contributing in any degree to his injury, the damages otherwise

recoverable shall be diminished by the jury in proportion to the amount of negligence attributable to him.

If the primary cause of the employee's injury was his own act or his own negligence, he is not entitled to recover under the Act. If the primary cause was the negligence of his railroad employer or of any of its agents or employees other than himself, then the injured employee has his right of action even though his own negligence contributed to the injury.

Where the act of an individual is the primary cause of an injury to himself, he has no right to recover therefor at common law. And this rule is unimpaired by the provision of the Employers' Liability Act that *contributory* negligence shall not bar a recovery. If the injury of an employee is primarily the result of his own negligence, then it cannot be said to be "due to its [the employer's] negligence." Nor does such injury result "wholly or in part from the negligence of any of the officers, agents, or employees of such carrier" under any proper interpretation of the words.

Negligence of the employee which *contributes* to the injury, but which is not its primal cause, does not bar a recovery.

Negligence of an employee which, after a primary cause has been set in motion by the negli-

gence of a carrier or its agents (other than the injured employee), may contribute to his injury, does not bar a recovery under the Act.

The broad and comprehensive nature of the relief to be given for deaths and injuries in interstate service of railroads is indicated by the interpretation of its terms in the minority report of the Committee of the House of Representatives. At page 92, Report No. 1386 of the Sixtieth Congress, First Session, the minority of the Committee say:

“ . . . This bill greatly enlarges the rights of the employee and imposes new and onerous burdens upon the employer, making him practically an insurer. . . .”

This statement is not literally correct, but it is qualifiedly true. For in the unanimous report of the Judiciary Committee of the Senate (Report No. 432, Sixty-first Congress, Second Session, March 22, 1910) reference is made to the “stringent liability upon the railroads” established by the Act and to the “policy to radically change” the rules of the common law upon this subject. In the report last cited the Committee, on page 2, unanimously say:

“It was the intention of Congress in the enactment of this law originally, and it may be presumed to be the intention of the present Congress, to shift the burden of the loss resulting from these

casualties from 'those least able to bear it,' and place it upon those who can, as the Supreme Court said in the *Taylor Case*, 210 U. S. 281, 28 Sup. Ct. Rep. 616, 'measurably control their causes.' "

Thus if the tenor of the Act and the purpose and intent of Congress are to be given due weight, it is manifest that the statute is to be broadly and liberally construed to confer upon the employee's dependents a remedy for his death, or upon any employee a remedy for injuries received, without regard to any heretofore existing rule of the common law which by reason of the fellow-servant doctrine denied a remedy to him of them. And the modification of the doctrine of assumption of risk and contributory negligence is to be applied in full accord with the spirit of the Act. There seems to be no justification for any judicial construction which shall minimize any of the remedial features of this legislation.

## CHAPTER III

### NATURE OF ACTION

#### § 8. ACT AUTHORIZES NEW PLENARY ACTION.

The Act does not merely deprive the employer of an arbitrary defense. *Plummer v. Northern Pac. Ry. Co.*, 152 Fed. Rep. 206. A new plenary action is created by the statute. All the terms and conditions for its enforcement are solely dependent upon the Federal Act, and are not at all modified or controlled by any conflicting statutory or common-law rules of any of the States.<sup>1</sup> *Fulgham*

<sup>1</sup> Some recent cases under the Employers' Liability Law are the following: *Thompson v. Wabash R. Co.*, 184 Fed. Rep. 554, holding that a widow cannot maintain an action under the Act and that suit must be brought by the executor or administrator of deceased's estate.

In *Pederson v. Delaware, L. & W. R. Co.*, 184 Fed. Rep. 737, it was held that where the plaintiff was injured by a purely local train he could not recover under the Federal Act. The attempt to evade the force and effect of the federal law by establishing a line of demarcation between the interstate and intrastate activities of a railroad may afford an opening for a ruling that where such divergence exists, the employment is not a *common employment* and therefore that the employee *may recover at common law*. If the employment may be segregated on such lines, it cannot logically be held to be a "*common employment*" so as to relieve the master. See discussion of this subject *infra*, page 203.

That a wife temporarily separated from her husband at the time he was killed may be the beneficiary of an action under the Act

v. *Midland Valley R. Co.*, 167 Fed. Rep. 660, and cases there cited.

Although the action given under the Act may be brought in a court of a State which has jurisdiction of the parties, and although the action must be tried under the rules of practice and procedure prevailing in the district where it is brought, all substantive rights and remedies conferred by the Act are dependent upon the federal law alone. The rule of liability is prescribed solely by the Federal Act. The Act creates a new right and a new obligation. It changes the existing rules of law and permits "the recovery of damages for injuries for which there could be no recovery at common law or under pre-existing statutes." *Watson, Admx., v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942.

for his wrongful death was held in *Dunbar v. Charleston & N. C. Ry. Co.*, 186 Fed. Rep. 175.

In *Troxell v. Delaware, L. & W. R. Co.*, 180 Fed. Rep. 871, 876, the Court said: "We are inclined to the view that in a situation like the one at bar, where the carrier is engaged both in intra and interstate commerce, and negligently kills an employee in similar employment, that the personal representative of the decedent may institute a suit under the federal act, or action may be brought under a state act which is not in conflict with the federal act."

That the amendment approved April 5, 1910, is not retroactive and does not apply to actions then pending, see *New v. Baltimore & O. R. Co.*, 181 Fed. Rep. 698.

**§ 9. FEDERAL ACT, WHERE APPLICABLE, IS EXCLUSIVE.**

Not only does this Act exclude the concurrent existence of any common-law action for negligence arising out of the facts necessary to maintain an action under its provisions, but all statutes and laws of the States by virtue of which a right of action heretofore existed to enable an interstate employee to recover damages for personal injuries against an interstate carrier are now inoperative as to such injuries.

"When the Act is analyzed it becomes apparent that it was the purpose of the Congress to confer rights and benefits upon the injured employee which were denied him by the common law; and hence the existence of a common-law right of action on the part of an injured employee cannot, in reason, be claimed in the presence of this Act of Congress. Indeed; the Act is the law, and the only law, under which suits like the present one may be brought. It is the law of the case by which the rights of the employee and the liability of the carrier are measured. The very subject-matter of the controversy is federal." *Cound v. Atchison, T. & S. F. Ry. Co.*, 173 Fed. Rep. 527.

As said in *Gibbons v. Ogden*, 9 Wheat. 1, at pp. 210, 211:

"The nullity of an act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The ap-

ropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislature as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

#### § 10. NECESSITY OF PLEADING BASIS FOR FEDERAL RIGHT.

There is apparently some conflict of authority upon the question whether or not it is essential that the declaration shall indicate the plaintiff's reliance upon the federal right conferred upon him by the statute. It has been held that in the federal courts it is not necessary to plead the Act specially or to make reference to its provisions. *Cound v. Atchison, T. & S. F. Ry. Co.*, 173 Fed. Rep. 527; *Voelker v. Chicago, M. & St. P. Ry. Co.*, 116 Fed. Rep. 867, 129 Fed. Rep. 522. In a proceeding under a similar statute it was decided by the Supreme Court of Kansas that "the petition stated no cause of action under the federal statute," and

that plaintiff, therefore, could not prevail by reason of his right to rely on a federal statute. *Brinkmeier v. Missouri Pacific Ry. Co.*, 81 Kan. 101, 105 Pac. Rep. 221. This case has been carried on writ of error to the Supreme Court of the United States, where it is pending. Its determination will settle the question of sufficiency of a pleading in an action based upon a federal right.

In view of the recent decision in the case of *Allen v. Tuscarora Val. R. Co.*, 229 Pa. 97 (July 1, 1910) (citing *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, *Boston & Maine R. Co. v. Hurd*, 108 Fed. Rep. 116, *Wabash R. Co. v. Bhymer*, 214 Ill. 579, and *Exposition Cotton Mills v. Western & Atlantic R. Co.*, 83 Ga. 441), it is important that the declaration should clearly and plainly disclose an intention on the part of the plaintiff to base his right of recovery under the federal statute. The cases above cited deny the right to a plaintiff to amend his declaration asserting a right of recovery at common law so that a right to recover under a statute may be availed of. In the *Wyler Case*, 158 U. S. 285, Mr. Justice White discusses the right to amend under such circumstances and holds that "As the first petition proceeded under the general law of master and servant and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law."

## CHAPTER IV

### WHEN IS A RAILROAD ENGAGED IN INTERSTATE COMMERCE?

#### § 11. IN GENERAL.

The Employers' Liability Act of 1908 provides a remedy for death or injury suffered by an employee against common carriers by railroad engaged in interstate commerce. The question, therefore, arises as to when a railroad is engaged in interstate commerce.

Judge Cooley in an address before the First General Conference of Railroad Commissioners at Washington, March, 1889, spoke as follows: "But there is scarcely a line of road in the country so short or so insignificant that the method in which its operations shall be conducted is not of something more than local importance, or the character of its regulation of some concern to business interests beyond the state limits. It may be a link in a long line extending through two or more States. It may be the principal or perhaps the sole means of transportation for the products of a mine or other important industry which supplies many States, but whether of greater or less importance, it has relations to

other roads which are not and cannot be wholly limited within any political division of the country, however extensive it may be; even the little Catskill Mountain Railroad by the issue of coupon tickets to San Francisco may in a sense become a part of a transcontinental highway, and the citizen from the Pacific Coast who applies for one of the tickets has an interest in the treatment he shall receive in respect to it, which is precisely the same that it would be if all the roads of the country were one in ownership and in management."

A railroad is engaged in interstate commerce —

- a. When its line extends into and is operated in two or more States;
- b. When its line is wholly within the limits of a single State, if tickets for passengers are sold, or bills of lading for freight are issued, for continuous transportation to other States over its own and connecting lines;
- c. Though its line is wholly within a single State and though no passenger tickets for passage outside the State are sold, and though no bills of lading are issued for the carriage of freight beyond the lines of the State, if it generally transports in continuous transit merchandise from a point of origin outside the State to a point within the State, or from a point within the State in continuous journey to a point without the State;
- d. If, though its line is wholly within the

limits of a single State, it carries, under contract with an express company, packages in transit between States;

*e.* If, though wholly within the limits of a single State, it transports over its line cars loaded with interstate traffic;

*f.* If its line, though wholly within a single State, is a link in an interstate highway;

*g. Quaere:* Is a line of railroad, otherwise local, made interstate by the carriage of the United States mail? *In re Debs*, 158 U. S. 564.

#### § 12. INTERNATIONAL TEXT BOOK COMPANY CASE.

In the case of *International Textbook Company v. Pigg*, 217 U. S. 91, 30 Sup. Ct. Rep. 481, it was held that a company engaged in the business of imparting instruction "by means of correspondence through the mails between the company at its office . . . and the applicant at his residence in another State," was engaged in interstate commerce.

In the course of the opinion Mr. Justice Harlan said: "It is true that the business in which the International Textbook Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the States within the meaning of the Constitution of the United States. It

involved, as already suggested, regular and practically continuous intercourse between the Text-book Company located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that: this mode — looking at the contracts between the Textbook Company and its scholars — involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different States — particularly when it is in execution of a valid contract between them — is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph — ‘a new species of commerce,’ to use the words of this court in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9. In the great case of *Gibbons v. Ogden*, 9 Wheat. 1, 189, this court, speaking by Chief Justice Marshall, said,

'Commerce, undoubtedly, is traffic, but it is something more: it is *intercourse*.' Referring to the constitutional power of Congress to regulate commerce among the States and with foreign countries, this court said in the *Pensacola Case*, just cited, that 'it is not only the right but the duty of Congress to see to it that *intercourse* among the States and the *transmission of intelligence* are not obstructed or unnecessarily encumbered by State legislation.' This principle has never been modified by any subsequent decision of this court.

"The same thought was expressed in *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 356, 7 Sup. Ct. Rep. 1126, where the Court said: 'Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only *ideas, wishes, orders, and intelligence*.' It was said in the Circuit Court of Appeals for the Eighth Circuit, speaking by Judge Sanborn, in *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. Rep. 1, 17, that 'all interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate com-

merce.' If intercourse between persons in different States by means of telegraphic messages conveying intelligence or information is commerce among the States, which no State may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution, where, as here, such intercourse and communication really relates to matters of regular, continuous business and to the making of contracts and the transportation of books, papers, etc., appertaining to such business. In our further consideration of this case we shall therefore assume that the business of the Textbook Company, by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature."

If intercourse by means of the mail is interstate commerce, then it would seem to follow that the carriage of the mails is interstate commerce.

### § 13. AUTHORITIES UPON DECIDED ISSUES.

The liability of a railroad company, the lines of which are devoted to the service of interstate transportation is not affected by the fact that the traffic consists of products or materials owned by the carrying company. *United States v. Chicago,*

*M. & St. P. Ry. Co.*, 149 Fed. Rep. 486; *United States v. Southern Ry. Co.*, Kent's Index-Digest of Decisions under the Federal Safety Appliance Acts, 269.

The interstate character of a shipment is not changed by interrupting the course of transit at the State line. *Gulf, C. & S. F. R. Co. v. Fort Grain Co.*, 73 S. W. Rep. 845; *United States v. Colorado & N. W. R. Co.*, 157 Fed. Rep. 321 (now pending decision by the Supreme Court); *United States v. Chicago, M. & St. P. Ry. Co.*, 149 Fed. Rep. 486.

The interstate character of a shipment attaches the moment it is put on a car and begins to move from a point in one State destined to a point in another State. And that interstate character continues to inhere in the shipment until its final delivery is effected. It may, therefore, be said that a railroad company is engaged in interstate commerce during the entire period intervening between the loading of a shipment destined to be interstate and the surrender by the consignee of his bill of lading. *McNeil v. Southern Ry. Co.*, 202 U. S. 543, 26 Sup. Ct. Rep. 722; *In re Greene*, 52 Fed. Rep. 104; *United States v. Hopkins*, 82 Fed. Rep. 529; *United States v. Boyer*, 85 Fed. Rep. 425; *United States v. Geddes*, 131 Fed. Rep. 452; *Belt Ry. Co. of Chicago v. United States*, 168 Fed. Rep. 542; *United States v. Colorado & N. W.*

*Ry. Co.*, 157 Fed. Rep. 321; *United States v. Central of Ga. Ry. Co.*, 157 Fed. Rep. 893; *United States v. Southern Ry. Co.*, Kent's Index-Digest of Decisions under the Federal Safety Appliance Acts, 269; *St. Louis & S. F. Ry. v. Delk*, 158 Fed. Rep. 931; *Chicago, M. & St. Paul Ry. Co. v. Voelker*, 129 Fed. Rep. 522; *Pacific Coast Ry. Co. v. United States*, 173 Fed. Rep. 448.

The mere participation by a railroad in the transportation of traffic destined from a point in one State to a point in another State, from or to a point in a State to or from a point in a Territory of the United States, or between two or more points in a Territory, subjects the carrier to the regulation of the Federal Government. This is true whether the participation consists in a division under a joint rate of transportation, or if the lines of the carrier in question constitute a link in a through route to such interstate transportation. *United States v. Standard Oil Co.*, 155 Fed. Rep. 305; *Interstate Commerce Commission v. Cincinnati N. O. & T. P. Ry.*, 162 U. S. 184, 16 Sup. Ct. Rep. 700; *Parsons v. Chicago & N. W. Ry. Co.*, 167 U. S. 447, 17 Sup. Ct. Rep. 887; *Chicago & N. W. Ry. Co. v. Osborne*, 52 Fed. Rep. 912; *Tozer v. United States*, 52 Fed. Rep. 917; *Texas & N. O. R. Co. et al. v. Sabine Tram Co.*, 121 S. W. Rep. 256; *Belt Line Ry. of Chicago v. United States*, 168 Fed. Rep. 542; *Norfolk & W. R. Co. v.*

*Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. Rep. 958.

An interesting question has arisen in regard to the interstate character of a shipment transported from a point in one State through a contiguous State to another point in the State of origin. The affirmative of this proposition is sustained in the following cases: *Sternberger v. Cape Fear and Y. V. R. Co.*, 7 S. E. Rep. 836; *State v. Chicago, St. P., M. and O. R. Co.*, 40 Minn. 267; *New Orleans Cotton Ex. v. Cincinnati, N. O. & T. P. R. Co.*, 2 I. C. C. Rep. 289; *Kansas C. S. Ry. v. R. R. Com. of Arkansas*, 106 Fed. Rep. 359; *United States v. Erie R. Co.*, 166 Fed. Rep. 352; *Shelby Ice & Fuel Co. v. Southern Ry. Co.*, 60 S. E. Rep. 721; *Davis v. Southern Ry. Co.*, 60 S. E. Rep. 722; *St. Louis & S. F. R. Co. v. State*, 113 S. W. Rep. 203; *Mires v. St. Louis & S. F. Ry. Co.*, 114 S. W. Rep. 1052; *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. Rep. 214.

The negative aspect of the proposition is sustained by the following cases: *Commonwealth v. Lehigh Valley R. Co.*, 17 Atl. Rep. 179; *Lehigh Valley R. Co. v. Commonwealth*, 18 Atl. Rep. 125; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. Rep. 806; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 26 Sup. Ct. Rep. 208; *United States*

v. *Lehigh Valley R. Co.*, 115 Fed. Rep. 373; *Campbell v. Chicago, M. & St. P. Ry. Co.*, 53 N. W. Rep. 323; *Seawell et al. v. Kansas City, Fort S. & M. R. Co.*, 24 S. W. Rep. 1002.

The amenability of railroads to federal regulation arises from their participation in the carriage of interstate traffic and extends to corporations, the lines of which are confined within the limits of a single State, if such carriers accept through traffic to or from a point in another State. As held in *Ex parte Koehler*, 30 Fed. Rep. 867, the transportation of property from one State to another is interstate commerce, whether the carriers engaged in moving it or the vehicles on which it is borne, cross the line of a State or not. This principle has been enunciated in a considerable number of decisions in the state and federal courts, of which the following are typical: *United States v. Colorado & N. W. R. Co.*, 157 Fed. Rep. 321; *United States v. Pacific Coast Ry. Co.*, 173 Fed. Rep. 448, 453; *Texas & N. O. R. Co. et al. v. Sabine Tram Co.*, 121 S. W. Rep. 256; *United States v. Coombs*, 37 U. S. 72; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. Rep. 1087; *Augusta S. R. Co. v. Wrightsville and T. R. Co.*, 74 Fed. Rep. 522; *Interstate Stock Yards Co. v. Indianapolis U. Ry. Co.*, 99 Fed. Rep. 472; *United States v. Delaware L. & W. R. Co.*, 152 Fed. Rep. 269; *Interstate Commerce Commission*

v. *Bellaire, Z. & C. Ry. Co.*, 77 Fed. Rep. 942; *United States v. Colorado & N. W. R. Co.*, 157 Fed. Rep. 321; *United States v. Illinois Term. R. Co.*, 168 Fed. Rep. 546; *Texas & P. Ry. Co. v. Clark*, 23 S. W. Rep. 698; *Houston D. Nav. Co. v. Insurance Co. of N. A.*, 32 S. W. Rep. 889; *Texas & P. Ry. Co. v. Avery*, 33 S. W. Rep. 704; *Galveston, H. & S. A. Ry. Co. v. Armstrong*, 43 S. W. Rep. 614; *State v. Southern Kansas Ry. Co. of Texas*, 49 S. W. Rep. 252; *Texas & P. Ry. Co. v. Davis*, 54 S. W. Rep. 381; *Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.*, 92 S. W. Rep. 714; *Porter v. St. Louis S. W. Ry. Co.*, 95 S. W. Rep. 453; *Missouri, Kansas, & T. Ry. Co. v. New Era Milling Co.*, 101 Pac. Rep. 1011; *Cutting v. Fla. Ry. & Nav. Co. et al.*, 46 Fed. Rep. 641; *Interstate Commerce Commission v. Seaboard A. L. Ry. Co.*, 82 Fed. Rep. 563; *Perkins v. Northern Pacific Ry. Co.*, 155 Fed. Rep. 445.

Contra: See *United States v. Geddes*, 131 Fed. Rep. 452; *Interstate Commerce Commission v. Chicago, K. & S. R. Co.*, 81 Fed. Rep. 783; *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. Rep. 666; *Armoar Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. Rep. 428; *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. Rep. 360.

In the case of *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 204 U. S. 403, the Supreme Court held

that a railroad company which transported a shipment from the point of its original destination to another point in the same State, even though the shipment had in point of fact originated in another State, was not *on that account* a "railroad engaged in interstate commerce." But this was clearly a case of reshipment by a new consignor.

Any railroad company, irrespective of the limitation of its lines within the boundary of a single State, which participates in any degree whatsoever in the transportation of interstate commerce is a "railroad engaged in interstate commerce." This is the logical result of the reasoning of the Supreme Court in the case of *The Daniel Ball*, 10 Wall. 557, in which case the court said: "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity has commenced."

Transportation of freight from a point in one State to a point in another is interstate commerce, and such shipment does not become intrastate commerce when it reaches the state line, but continues interstate commerce until delivered at the final place of destination. *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. Rep. 664.

But when the commodity transported has reached the termination of its journey, and has been delivered to the consignee, it ceases to be a subject of interstate commerce, and the subse-

quent shipment from the point at which it has been delivered to another point in the same State is an intrastate shipment. *Coe v. Erroll*, 116 U. S. 517, 6 Sup. Ct. Rep. 475; *Ft. Worth & D. C. Ry. Co. v. Whitehead*, 6 Texas Civil Appeals 595; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. Rep. 700; *Chicago & N. W. Ry. Co. v. Osborne*, 52 Fed. Rep. 912; *Interstate Commerce Commission v. Bellaire Z. & C. Ry.*, 77 Fed. Rep. 942; *Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co.*, 167 U. S. 633, 17 Sup. Ct. Rep. 986; *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. Rep. 407.

A railroad company engaged in a switching movement of interstate cars is a railroad engaged in interstate commerce. *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. Rep. 158; *Rosney v. Erie R. Co.*, 135 Fed. Rep. 311; *Wabash R. Co. v. United States*, 168 Fed. Rep. 1; *Belt Ry. Co. of Chicago v. United States*, 168 Fed. Rep. 542; *Chicago, M. & St. P. Co. v. United States*, 165 Fed. Rep. 423; *Union Stock Yards Co. of Omaha v. United States*, 169 Fed. Rep. 404; *United States v. Pittsburgh, C. C. & St. L. Ry. Co.*, 143 Fed. Rep. 360; *Crawford v. New York C. & H. R. R. Co.*, 10 Am. Neg. Rep. 166; *Mobile, J. & K. C. R. Co. v. Bromberg*, 37 Southern Rep. 395; *United States v. Northern Pacific Terminal Co.*, 144 Fed. Rep. 861.

**§ 14. SUMMARY FROM AUTHORITIES.**

From a review of the foregoing it may be said generally that a railroad company is "engaged in interstate commerce"

- a. if it engages generally in the transportation of passengers or freight or express traffic from one State or Territory into or through some other State or Territory, or from the District of Columbia into or through any State or from any State into the District of Columbia;
- b. if it operates in one State alone but sells passenger or freight or express transportation over its line to points in another State or States;
- c. if it handles over its line freight billed through and on its journey to States other than the State from which such traffic is billed and originates;
- d. if it receives and forwards traffic in continuous journey from one State to another; or
- e. if it passes through a contiguous State *en route* from one point in a State to another point within the same State.

A railroad engaged in any transportation of freight or passengers in any Territory, or in the District of Columbia, is within the scope of the Act.

**§ 15. METHOD OF PROOF.**

A railroad, as to any of its local branches, is engaged in interstate commerce if, by filing schedules of rates for interstate traffic to and from any of the stations on such local branch, it holds itself out generally as ready to transact interstate business over such local branch. The freight and passenger tariffs are open to public inspection on each of the interstate railroads of the country, and are also filed with the Interstate Commerce Commission at Washington.

Proof of the movement of interstate traffic over the tracks of almost every local subdivision of an interstate railroad may be secured by the service of a *subpæna duces tecum* upon the official having custody of the records of freight and passenger traffic over such subdivision.

Proof of the transaction of general interstate traffic over any particular branch or subdivision of a railroad would seem to bring within the scope of the Act any employee who is injured while engaged in the maintenance or operation of any of the permanent instrumentalities of such branch or subdivision.

**§ 16. ACT APPLIES TO INTERSTATE ELECTRIC LINES.**

There can be little doubt that street railways which transport passengers across state lines are

included within the terms of the Act. This statute differs from the Arbitration Act and the Safety Appliance Act in this, that it makes no express exclusion from its terms of street railways, while in those Acts street railways were expressly excepted. The omission of any such exception in the present Act seems to indicate the congressional intent to include them. The language of the Act seems to include them. In view of the comprehensive and inclusive definitions of interstate commerce made by the courts, it will be seen that the service and activities of most of the railroads in the United States bring them within the scope of the statute here under consideration.<sup>1</sup>

<sup>1</sup> The contention that street railways engaged in interstate traffic are within the scope of the Employers' Liability Act seems to find support in the reasoning of the Interstate Commerce Commission in its opinion that such railways were included in the Act to Regulate Commerce. *Willson v. Rock Creek R. Co.*, 7 I. C. C. Rep. 83; *West End Improvement Club v. Omaha & C. B. Ry. & B. Co.*, 17 I. C. C. Rep. 239, with authorities cited.

## CHAPTER V

### WHAT EMPLOYEES ARE ENGAGED IN INTERSTATE COMMERCE?

#### § 17. EMPLOYEES INCLUDED IN THE ACT.

To bring a case within the application of the Employers' Liability Act of 1908, not only must the railroad have been engaged in interstate traffic, but the employee for whose death or injury redress is sought must, at the time of the accident, have been himself engaged in interstate commerce.

A telegrapher may send messages only between points within a single State, so that in one sense he is an intrastate servant, yet many of the despatches he handles relate to interstate or through trains. These latter trains could not move without the telegraphic orders he transmits. So in a larger sense he is engaged in interstate commerce, and the safety of interstate operation may depend upon the proper performance of his duty.

The work of a track-walker or track-repairer in like manner seems, at first blush, to be local in character. But no logic can exclude him from the interstate service, for his duty is as essential to

the safe and expeditious movement of interstate trains as the work of the crew of such trains.

And the logic which includes the telegrapher and the track-repairer in the common employment doctrine indubitably results in their inclusion in the interstate service in which the railroad is engaged. That an employee engaged in the work of repairing a track which is used indiscriminately for both interstate and intrastate commerce is engaged in interstate commerce has been determined in a case arising under this Act. *Zikos v. Oregon L. & N. Co.*, 179 Fed. Rep. 893. In this case the Court said: "But the track of a railroad company engaged both in interstate and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. Where the traffic is not in fact interstate, although upon a railroad engaged in commerce between the States, such as trains devoted entirely to local business and wholly within the boundaries of a State, a different case is presented. There it is possible to identify what is and what is not interstate; but where, as in this case, a road is admittedly engaged in both, it becomes impossible to say that particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both. To hold, then, that a workman engaged in repairs upon the track of such a

carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the States — to deny the power of Congress over interstate commerce, — but that the power extends to the control of those instrumentalities through which commerce is carried on, is not an open question. . . .

"The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce.

"Since the track, in the nature of things, must be maintained for commerce between the States, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to federal control, even though it may contribute to carriage wholly within the State. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject matter whenever a carrier is using the track for the double purpose."

In *Colasurdo v. Central R. R. of N. J.*, 180 Fed. Rep. 832, another case arising under the Employers' Liability Act of 1908, a plaintiff was held to be entitled to the remedy under the Act where

he was injured while repairing a switch in the defendant's yards at Jersey City. This work of repairing a switch was held to be interstate business, for the reason that the switch was necessarily used in both kinds of commerce.

Terminal charges have been held to be within the regulative power of Congress, therefore it may fairly be concluded that yardmen at terminals where local and interstate traffic are commingled and generally handled without discrimination, are engaged in interstate commerce and are within the scope of the Act.

This has been expressly decided in *Johnson v. Great Northern Ry. Co.*, 178 Fed. Rep. 643, citing *Chicago Junction Ry. Co. v. King*, 169 Fed. Rep. 372.

By the terms of the Act "any" employee "while" engaged in interstate commerce is included in the Act. The protection of the Act is thus given only "while" the employee is engaged in interstate commerce.

According to the interpretation already given by the courts, general service in the performance of duty relating to interstate commerce is not sufficient. The particular service in which an employee is engaged at the time of the injury must have direct relation to the interstate traffic in which the railroad company is engaged. Thus, an engineer of a train *purely local* (that is, a train

which is at the time engaged in the transportation of no interstate freight, passengers or interstate express matter) is not entitled to a remedy under the provisions of this Act. And this is true if he should be injured by a collision with an interstate train on an interstate highway, because he is not, at the time of the injury, himself engaged in interstate commerce, and the terms of the Act limit a recovery to employees who suffer injury "while" engaged in interstate commerce.

But what rule may be laid down for the determination of the question, "When is an employee engaged in interstate commerce?" The crew of an interstate train is of course included. A switchman engaged in duty, as such, for an interstate train, a freight handler while employed in handling interstate or foreign freight and mechanics or car repair men, while engaged in work upon interstate cars or other interstate instrumentalities, and while passing over the road for the purpose of making repairs upon cars or engines of an interstate train are also included, and emergency or wrecking crews while at work upon any train on an interstate highway may reasonably be included.

In other words, all who are at the time of injury engaged in duty which has direct relation to the interstate business of the carrier are entitled to the protection of the Act.

The Act may fairly be interpreted to include all mechanics who are engaged at the time of injury upon instrumentalities which are generally and indiscriminately used for all the purposes of an interstate railroad, as, for instance, linemen, track repairers and laborers engaged in the general maintenance of the interstate highway or its signal wires or apparatus, and those whose duties relate to the construction, maintenance, and repair of those instrumentalities which are used in the business conducted by the interstate railroad without discrimination between the local or interstate character of its traffic. *Snead v. Central of Georgia Ry. Co.*, 151 Fed. Rep. 608.

These general terms include the vast majority of the employees of an interstate railroad who may be affected by peril of accident, for, as railroads are practically conducted, there are few employees whose duty is so purely local that they have no relation to interstate traffic.

This interpretation of the Act is sustained in the case of *Johnson v. Great Northern Ry. Co.*, 178 Fed. Rep. 643, in the Circuit Court of Appeals for the Eighth Circuit. District Judge William H. Munger, in the majority opinion, said: "It is argued that the Employers' Liability Act can have no application to the case, as plaintiff was not an employee engaged in interstate commerce. A part of his employment was to see the coupling

of cars and the air hose upon the cars which were placed upon the transfer tracks. Some of those cars, among them the one in question, were engaged in interstate commerce.

"It is difficult to see why he was not an employee engaged in the movement of interstate commerce to as full an extent as a switchman engaged in the making up of trains in the railroad yards, as in the case of *Chicago Junction Ry. Co. v. King*, 169 Fed. Rep. 372."

#### § 18. EMPLOYMENT MUST RELATE TO MOVEMENT OF TRAFFIC.

Not every employee who is engaged in work auxiliary to interstate commerce is included in the Act. The work of the employee, to bring him within the terms of the Act, must be directly connected with and in aid of the traffic itself, or in the maintenance of instrumentalities which are generally used in such interstate traffic.

In *Milner v. Great Northern Ry. Co.*, 2 Minton-Senhouse Workmen's Compensation Cases, 51, 52, Lord Justice A. L. Smith said that in his opinion a refreshment-room did not come within the meaning of a railway in the Workmen's Compensation Act, coupled with the Regulations of Railways Act, 1873. By section 3 of the latter-mentioned Act "railway" included every station used for the purpose of public traffic. The question

was whether this refreshment-room was used for the purpose of public traffic, for in his opinion the section did not mean every part of the station, but that part of the station which was used for purposes of public traffic. He thought that a book-stall could not be said to be so used, neither could a hotel.

In the case of *South Eastern Railway Company v. Railway Commissioners*, 6 Q. B. D. 586, the question was whether the Railway Commission had jurisdiction over refreshment-rooms. "The Commissioners had assumed such jurisdiction, but the Court of Appeal held that they were wrong in doing so, on the ground that refreshment-rooms did not come within the meaning of 'facilities for the receiving, forwarding, and delivering traffic upon the railway,' however desirable they might be for the comfort or convenience of passengers. . . . A refreshment-room at a railway station was not used for the purposes of public traffic, but was only for the convenience of passengers."

In the case of *Philadelphia, B. & W.R. Co. v. Tucker*, 35 App. D. C. 123, the Court said: "When Tucker was killed he was upon the premises of the defendant in response to its call, to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage. Can it be that

under such circumstances the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the Act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service because the injury occurs before the service is actually undertaken, notwithstanding that at the time of the injury the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. . . .

"In *Packet Company v. McCue*, 17 Wall. 508, a bystander was hired on a wharf to assist in loading a boat which was soon to sail. This man had

been occasionally employed in such work. His services occupied about two and one-half hours, when he was directed to go to 'the office,' which was on the boat, and get his pay. This he did and then attempted to go ashore. While on the gangplank the plank was recklessly pulled from under his feet and he was thrown against the dock, receiving injuries from which he died. Owing to the somewhat peculiar nature of the case it was held that it was for the jury to say, although the facts were undisputed, whether the relationship of master and servant existed until the man got completely ashore. The concluding sentence of the opinion of Mr. Justice Davis was as follows: 'The defense at best was a narrow one and, in our view, more technical than just.'

"In *Ewald v. The Chicago & N. W. R. Co.*, 70 Wis. 420, it was held that an engine-wiper employed in the defendant's roundhouse, while going to his work along a pathway crossing the defendant's yard and tracks was an employee of the defendant, hence could not recover for injury resulting from the negligence of a fellow-servant on the freight train causing the injury. The court in its opinion said: 'The peculiar facts of this case which make him such appear to involve precisely the same principle as that class of cases where the plaintiff was being carried on his way from and to his place of labor by the railroad com-

pany, by consent, custom, or contract, and was injured by the negligence of other employees of the company. This carriage to the plaintiff was the means, facility, and advantage to which he was entitled by reason of his being an employee or servant, which entered into and became a part of his contract of employment or were incidental and necessary to it. . . .

"' . . . Again, it may be said that the plaintiff was still an employee, because he was attempting to use the pathway between the cars as the only customary and convenient means of access to and exit from the roundhouse which the company had provided and was under obligation to keep open and safe for him and his fellow-workmen when he was injured.'

"In *Boldt v. New York C. R. Co.*, 18 N. Y. 432, plaintiff was injured while walking on a new track from his house to his work. The court said: 'But he was in the defendant's employment and doing that which was essential to enabling him to discharge his particular duty, viz., going to the spot where it was to be performed, and he was, moreover, going on the track where, except as the servant of the company, he had no right to be. He was there as the employee of the company, and because he was such an employee.'

"But it is urged that *Fletcher v. Baltimore & Potomac R. Co.*, 168 U. S. 135, 18 Sup. Ct. Rep.

35, sustains the view of the defendant on this question. We do not so read that case. There the plaintiff at the time of the accident had ended his work for the day, and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have, when he was struck by the rebounding of a stick of timber thrown from a train of the defendant by one of its employees, a practice permitted by the company, and injured. It was held that 'the liability of the defendant to the plaintiff for the act in question is not to be gauged by the law applicable to fellow-servants, where the negligence of one fellow-servant by which another is injured imposes no liability upon the common employer.' Manifestly that case and this are materially different. There the plaintiff was not on the premises of the defendant, but upon a public highway where his relations to the defendant were precisely those of the general public to it. Its relation to him, therefore, in such a situation was precisely what it would have been to any other pedestrian. Here, however, the plaintiff was upon the premises of the defendant, upon its invitation, in the line of his employment, and solely because of such employment. We hold, therefore, that at the time of his death Tucker was within the protection of said Act."

**§ 19. CAUSAL RELATION BETWEEN EMPLOYMENT  
AND INJURY.**

The title of the Employers' Liability Act is "An Act relating to the liability of common carriers by railroads to their employees in certain cases." From this title, as well as from the context of the Act, it is apparent that the remedy provided is one which arises only when the employee is killed or injured from a cause which is incidental to or arising out of railroad employment.

If any injury arises from a cause in no manner connected with, or arising out of such employment, no recovery is possible under the Act.

Section 1 expressly limits the right of recovery under its terms "to any person suffering injury while he is employed by such carrier in such commerce."

In *Armitage v. Lancashire & Yorkshire Ry. Co.*, 4 Minton-Senhouse Workmen's Compensation Cases, 5, in which case A maliciously threw a piece of iron at B, which struck the eye of C who was at work, it was decided that a workman who was injured through the tortious act of a fellow-workman, *which had no relation whatever* to their employment, had no claim against his employer, because the injury did not arise out of the employment.

Collins, M. R., in delivering the opinion of the court, said: "It seems to me that in such a case the accident would not arise 'out of or in the course

of the employment.' *It would not be an incident of the employment* at all. It would be entirely outside the scope of the employment of the doer of the act and of the injured workman. . . . It seems to me, as a matter of law, that we cannot say that the injury caused by a missile thrown by another workman entirely outside the scope of his employment was caused by an accident which arose out of his employment."

There must be, as Lord M'Laren said in *O'Brien v. Star Line, Limited*, I Butterworth's Workmen's Compensation Cases, 177, at page 181, "some causal relation between the employment and the accident."

In the case of *Jackson v. Chicago, R. I. & P. Ry. Co.*, 178 Fed. Rep. 432, 435, Smith McPherson, District Judge, said: "The test of the employer's liability is not the fact that the negligent act of the servant was during the existence of his employment; nor is the test that his act was done during the time he was doing some act for his employer. But the test is: Was the act causing the injury done in the prosecution of the master's business? *Clancy v. Barker*, 131 Fed. Rep. 161; *Bowen v. Illinois C. R. Co.*, 136 Fed. Rep. 306; *St. Louis S. W. R. Co. v. Harvey*, 144 Fed. Rep. 806; *Morier v. St. Paul, M. & M. R. Co.*, 31 Minn. 351, 17 N. W. Rep. 952; *Hudson v. Missouri K. & T. R. Co.*, 16 Kan. 470."

"But where the servant, instead of doing that which he was employed to do, does something which he was not employed to do at all, the master cannot be said to do it by his servant," Maule, J., in *Mitchell v. Crassweller*, 13 C. B. 235, and Parke, B., in *Joel v. Morrison*, 6 C. & P. 501, "but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

The statute makes the carrier liable for negligence of any of its officers, agents, or employees. Logically, therefore, the negligence to be actionable must be in the capacity of officers, agents, or employees. It is not every act of negligence of a person who happens to be an employee, but the negligence of an employee, *as such*. The negligence must have some natural relation to the employment or business of the carrier, and must be negligence relating to or incidental to the employer's business. Of course, the statute does not apply to an injury received at a time, and place, and from a cause entirely disconnected with the employment.

## CHAPTER VI

### CONSTRUCTION OF THE ACT

#### **§ 20. STATUTE IS NOT RETROACTIVE.**

And this was the interpretation given also to the Act of June 11, 1906. *Hall v. Chicago, R. I. & P. Ry. Co.*, 149 Fed. Rep. 564.

It was decided in the case of *Winfrey v. Northern Pacific Ry. Co.*, 164 Fed. Rep. 698, that the expression "action hereafter brought," in section 3 of the present Act indicates that the Act "does not apply to an action by an employee for an injury received before the statute was enacted."

#### **§ 21. NO RECOVERY WHEN INJURY CAUSED SOLELY BY PLAINTIFF'S OWN NEGLIGENCE.**

If the injury is caused solely or primarily by the employee's own negligence, he cannot recover. If it was caused in whole or in part by the negligence of the railroad or any of its employees other than himself, he, or in case of his death his dependents, may recover. If the negligence of the railroad or any of its employees was the primary cause of, or proximately contributed to, the injury, a recovery may be had under the Act. *Kennedy v. Erie Railroad Co.*, Charge to jury of District

Judge McCall, U. S. Circuit Court, Northern District of Ohio, November 13, 1909, not yet reported.

**§ 22. VENUE OF ACTION.**

The Act as amended in 1910 permits a plaintiff to bring his suit in the Circuit Court<sup>1</sup> of the district where the cause of action arose, or in the district where the defendant may be doing business.

**§ 23. JURISDICTION CONCURRENT IN STATE AND FEDERAL COURTS.**

The amended Act of 1910 also permits a concurrent jurisdiction over actions for damages under this law in the courts of the several States and the courts of the United States. This permits the plaintiff to bring his action in a State court, and when the action is so begun, the defending railroad is prohibited from removing the case from the state to the federal court.

**§ 24. SURVIVAL OF ACTION.**

The Act as amended provides for the survival of any right of action for the benefit of the surviving widow and children, in case an employee dies after receiving personal injuries.

<sup>1</sup> For statement relative to the discontinuance of the Circuit Courts of the United States and the assumption of their jurisdiction by the United States District Courts, see footnote <sup>31</sup> on page 38.

**§ 25. CONSTRUCTION OF SECTION 1 OF THE ACT  
OF 1908.**

If the construction which has been given to the concluding portion of section 1, by District Judge Whitson, Eastern District of Washington, in the case of *Campbell v. Spokane & Inland Empire R. Co.*, not yet reported, is correct, the provision giving a remedy against the carrier for death or injury of an employee which arises "by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment" amounts only to a legislative re-enactment of the common law.

In that case Judge Whitson said: "The theory that the provision allowing damages for defects or insufficiency in cars, engines, and the like has enlarged upon the liability theretofore existing cannot be accepted. No enactment was needed to enable an employee to hold his employer to the payment of damages when negligent in this regard."

But the law of negligence as it existed generally throughout the country before the enactment of the Federal Employers' Liability Act provided no remedy for an injured railroad employee, no matter how flagrant the negligence of his employer in permitting its cars, appliances, machinery, etc., to become defective, if the employee had knowl-

edge of the defective condition of such equipment and continued to use it in his work. He was then presumed to have assumed the risk of injury from such appliances. This was the common-law rule.

This "assumption of risk" was contractual and arose out of the contract of employment. But this statute makes void any contract "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act."

Therefore no contract for an assumption of risk is legally enforceable, either expressly or by implication. Certainly no express contract that the employee should assume the risk of defective appliances of the carrier which employed him would be of any avail to the defendant. Can it be possible that an implied contract may be presumed which may be given legal force and efficacy where an express contract would fail to do so?

If as to the defective appliances mentioned in the statute there is no assumption of risk arising from the employees' use of such appliances, with full knowledge of the character of the defects, then "the liability theretofore existing" has been "enlarged."

This seems to be sustained by the reasoning of the Court of Appeals of the District of Columbia in the case of *Philadelphia, B. & W. R. Co. v.*

*Tucker*,<sup>1</sup> 35 App. D. C. 123, in its discussion of the interpretation of the Act of 1908. In that case the Court said:

"In this assignment it is sought to interpose as a defense to the action the doctrine of assumption of risk. While the Act does not in terms refer to this doctrine, it does provide in section 3 'that no contract of employment . . . shall constitute any bar or defense to an action brought to recover damages for personal injuries to or death of such employee.' The doctrine of assumption of risk results from the contractual relations of the parties. . . .

"In 1897 an Employers' Liability Act was passed in North Carolina. Section 2 of that Act provides: 'That any contract or agreement expressed or implied made by an employee of said company to waive the benefit of the aforesaid section shall be null and void.' Thereafter suit was brought by a railroad employee who was injured by reason of a patent defect in an engine, and the defense was that, inasmuch as he had continued to use this engine for some time after this defect was known

<sup>1</sup> The Supreme Court of the United States on May 29th, 1911, affirmed the decision of the Court of Appeals, District of Columbia, in the case of *Philadelphia, Baltimore & Washington Railroad Company, Plaintiff in Error v. Lillian Tucker, Admx.*, in a *per curiam* opinion citing the cases of *El Paso & N. E. Ry. v. Gutierrez*, 215 U. S. 87; and *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549.

to him, he assumed the risk of accident resulting from said defect. The court, however, ruled otherwise. The court said, *Coley v. North Carolina R. Co.*, 128 N. C. 534, 39 S. E. Rep. 43: 'It is agreed that assumption of risk is contractual either by express terms or by implication; and disputes usually were as to whether the plaintiff contracted by implication or assumption for dangers not existing at the date of employment. And it would seem by this Act that the Legislature intended to put an end to such contentions, by saying in the first section that he shall have a right of action for injuries caused by such defective machinery, and by providing in the second section that he cannot waive this right by contract express or implied.' The court in this opinion also called attention to the English case of *Smith v. Baker*, 1891, Appeal Cases, L. R., H. of L. 325, 60 L. J., Q. B. n. s. 683, in which was considered the English Employers' Act of 1880, which provides that an employee shall not maintain an action against his master for injuries received from defective machinery, ways, etc., unless he gives notice of such defects to the master or some superior, unless the master already knows of the defects. A majority of the Lords who rested their opinions upon the Act agreed that it did away with implied assumption of risk. . . .

"In interpreting this Act we should bear in mind 'the purpose of Congress to regulate the liability of employer to employee, and its evident intention to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation.' *El Paso & Northeastern R. Co. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. Rep. 217. Having that purpose in mind, courts ought not to place such a construction upon the Act unless compelled by its terms so to do, as will in a large measure defeat such purpose. There are comparatively few employees of common carriers who would sacrifice their positions because of known defects. We think this Act was intended to quicken the responsibility of carriers and, by doing away with the doctrine of assumption of risk in cases based upon their negligence, compel them to take proper precautions for the safety of their servants. In other words, the Act was meant to discourage negligence. It is an easy thing to say that no one is compelled to remain in the service of the carrier, but experience demonstrates that this is only half a truth. It is the policy of the law to protect, so far as possible, those pursuing, and oftentimes necessarily pursuing, so hazardous an employment. It is enough that they must assume the intrinsic risks of their calling, without com-

peeling them to assume the negligence of their employers.

"Our attention is directed to the difference in the phraseology of the Employers' Liability Act of April 22, 1906 (35 Stat. at L. 65, chap. 149), U. S. Comp. Stat. Supp. 1909, p. 1171, as bearing upon the question under consideration. That Act excuses employees from the rule of contributory negligence in any case where a failure by the carrier to comply with any statute enacted for the safety of employees contributed to the injury complained of. The Act then provides that the doctrine of assumption of risk shall not be applicable to such a situation. We see no reason why that Act should be interpreted as a legislative declaration that the prior Act of 1906 did not do away with the doctrine of assumption of risk, in so far at least as the injury forming the basis of the action resulted from the negligence of the carrier. There was special reason in the later Act for inserting a provision in respect of the doctrine. Moreover, it well might be held that since the first section of the later Act in terms charges the master with responsibility for any defect or insufficiency due to its negligence in its cars, engines, appliances, etc., that such a statute was 'enacted for the safety of employees,' and hence that the failure of the carrier to keep its cars, engines, appliances, etc., sufficiently free from defects

would prevent such carrier not only from interposing the defense of assumption of risk, but also from interposing the defense of contributory negligence. In other words, would the carrier, after admitting its negligence in failing to install and maintain proper and sufficient cars, engines, appliances, etc., and the injury resulting therefrom, be permitted to escape responsibility by resorting to the defense of assumption of risks? Clearly had section 1 in terms provided that carriers should install and maintain proper and sufficient cars, etc., and that the failure to do so would render it liable for accidents resulting from such failure and deprive it of the defense of contributory negligence, the carrier would not be permitted to defeat the law by resorting to the doctrine of assumption of risk. *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. Rep. 531. We are not called upon, however, to interpret the Act of 1908, and have alluded to it for the sole purpose of ascertaining, if possible, whether it sheds any light upon the meaning of the prior Act. We are not prepared to say that there is anything in the later Act which compels a different view than we have taken of the earlier one. Having in mind, therefore, the scope and purpose of the Act of 1906, we rule that the trial court was right in refusing the defendant's instruction upon the subject of the assumption of risk."

There is some importance and force to the suggestion of the District of Columbia court that the first section of the Act "in terms charges the master with responsibility for any defect or insufficiency" in the appliances named therein, that it is a statute "enacted for the safety of employees," and, therefore, that a failure on the part of the carrier to keep its cars and other appliances free from defects would relieve the plaintiff from any assumption of risk and from contributory negligence.

This is the only interpretation which gives any force and effect to the language used by Congress in the latter part of the first section relating to defect and insufficiency in "cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment." According to Judge Whitsom's view no such enactment was needed. Therefore this provision was purposeless and added nothing to the remedial rights of the employee.

But it is not lightly to be assumed that there was no purpose of Congress in the enactment of this provision. If a meaning can reasonably be found for its enactment, that interpretation should be followed.

As the interpretation of the provision as to defects in cars, etc., followed in the *Tucker Case* seems to be logical, reasonable, and consonant with the general purpose and intent of the Act,

it will probably be sustained rather than an interpretation which gives no force or effect to its terms.

The common law places a premium upon defective appliances in one application of the well-known doctrine of assumption of risk, in this, that the more obviously defective instrumentalities are, the more easily may the employer demonstrate the knowledge of the defective condition on the part of an injured employee, and thus bar the latter's right to recover damages caused by the employer's admitted negligence.

It may well be presumed that the provision making the defendant liable for a casualty to an employee caused by the defective condition of machinery, appliances, etc., of a carrier was intended to change this rule of the common law.

Unless this construction is given the provision in section 1, as to defective machinery, appliances, etc., no possible purpose could exist for Congress merely to enact the common-law rule, leaving applicable to its provisions the assumption-of-risk doctrine, which deprives an employee of a remedy where the defects were notorious and manifest. This would not be consistent with the legislative hostility to the doctrine of assumption of risk shown throughout the statute. It is not consistent with the legislative intent to protect employees.

Congress did not qualify the rule that defective

machinery, appliances, etc., were to be made the basis of a remedy for casualties resulting therefrom. It may therefore be presumed that the legislation was intended to give a remedy in such case unqualifiedly, and without regard to the common-law rule which exempted the master from liability where the defects were manifest and known to the employee. Unless such Congressional intent existed, there was no reason for enacting a provision as to the specific defects enumerated in the first section.

The place this provision occupies in the Act indicates that it was not of minor importance, but to qualify this provision with the assumption-of-risk doctrine would give to it no importance and no meaning.

## CHAPTER VII

### STATUTES FOR SAFETY OF EMPLOYEES AND EFFECT OF THEIR VIOLATION

#### § 26. EFFECT OF THE VIOLATION OF "ANY STATUTE."

The most radical and important departure made by this statute from the rules of law heretofore enunciated is found in the total abolition of the doctrines of contributory negligence and assumption of risk in all cases where the violation of any statute enacted for the safety of employees contributed to the casualty upon which the suit is based.

This seems to establish an absolute right of a plaintiff to recover damages upon proof of the following:

- (a) That plaintiff was employed by defendant;
- (b) That defendant was a common carrier engaged in interstate commerce by railroad;
- (c) That plaintiff met with injury while he was engaged in interstate commerce; and,
- (d) That the violation of a statute enacted for the safety of employees contributed to the injury upon which his suit is based.

It is clear that in such a case no defense is open

to the defendant arising out of the doctrine of assumption of risk or contributory negligence. In this particular the employee is given an advantage even over a passenger.

The railroad may always defend against a suit for damages for personal injuries brought by a passenger, that the negligence of the passenger contributed to the injury. This defense is not now open in a suit by an employee engaged in interstate commerce, when the injury complained of is one to which the railroad's violation of a statute enacted for the safety of employees in any manner contributed.

#### § 27. THE SAFETY APPLIANCE ACTS.

The most important of these statutes, the violation of which by an interstate railroad affords a basis for an action for personal injuries under the Employers' Liability Law, is the so-called Safety Appliance Act of 1893, as amended in 1896 and 1903. A full discussion of these statutes will be found on page 276 *et seq., post.*

There seems to be no escape from the conclusion that Congress intended to give an absolute remedy to all interstate railroad employees who were injured by reason of the absence or defective condition of appliances required by statutes enacted to provide for the safety of employees.

Sections 3 and 4 of the Employers' Liability Act

of 1908 definitely and expressly indicate the intention of Congress to give to any employee to which the Act applies an absolute right to recover, where the employer has violated any of the statutes enacted to preserve the safety of employees.

The language of the Act does not require that the violation of such safety statute shall be the *sole* cause of the accident, for the carrier is made absolutely liable where such violation *contributed* to the casualty, although this has been interpreted to mean that such violation was the proximate cause of the injury complained of.

In the case of *Johnson v. Great Northern Ry. Co.*, 178 Fed. Rep. 643, 647, Judge Munger said: "Nor do we think any question of contributory negligence or assumed risk upon the part of the plaintiff material in the determination of the case before us, *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. Rep. 407. By section 8 of the Safety Appliance Act it is provided 'That any employee of any such common carrier, who may be injured by any locomotive, car, or train, in use contrary to the provision of this Act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.'

"Again, we think the facts bring the case within

the provisions of Act Cong., April 22, 1908, c. 149  
35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1172)  
known as the 'Employers' Liability Act,' as the defendant in moving the car in question was engaged in interstate commerce, plaintiff was employed by such carrier in said commerce, and the proximate cause of the injury was the defective condition of the coupling pin. By that Act the question of contributory negligence, when applicable, is one of fact, to be submitted to the jury. The Act also provides: 'That no employee, who may be injured or killed, shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. . . .

"From a consideration of the whole case, we think the defendant a railroad company engaged in interstate commerce; that the car in question had upon it a coupler which was defective and did not comply with the Act of Congress; that at the time plaintiff was injured the movement of the car was a movement by defendant in interstate commerce; that plaintiff was injured while a servant of defendant and in the performance of his duty, aiding in the movement of interstate commerce; that the movement of the car with the defective coupler was the proximate cause of plaintiff's injury; that plaintiff did not assume the risk of

injury incident to the employment. Whether plaintiff was guilty of any negligence which contributed to the injury was, if applicable, a question for the jury."

#### § 28. THE HOURS OF SERVICE LAW.

Under the Hours of Service Law, 34 Stat. L. 1415, 1416, cases will undoubtedly arise where a right to recover is based upon the death or injury of an employee resulting from a violation of the terms of this statute. Where an employee is now on duty in excess of the period prescribed by the Hours of Service Law, such violation of statute would clearly entitle him, if he were injured, to recover under the provision of the Employers' Liability Act, without any defense being open to the railroad on the ground either of assumption of risk or contributory negligence. In the case of *New York v. Erie R. Co.*, 198 N. Y. 369, 91 N. E. Rep. 849, the Court said: "One familiar form of this class of legislation is that which has for its object the promotion of the health and welfare of the employee, as especially in the case of women and children. Another class seeks to protect the safety of the public by limiting the hours of labor of those who are in control of dangerous agencies, lest by excessive periods of duty they become fatigued and indifferent and cause accidents leading to injuries and destruction of

life. This statute comes within the latter class, and this court, in the case of *Pelin v. New York C. & H.R. R. Co.*, 102 App. Div. 71, 115 App. Div. 883, 188 N. Y. 565, affirmed a judgment where the basis of the recovery was as here, that the defendant had permitted or required an employee to be on duty for a length of time in excess of that prescribed by another section of the Act which we are now considering."

Another case upon this subject arising in North Carolina is the case of *Lloyd v. North Carolina R. Co.*, 151 N. C. 536, 66 S. E. Rep. 604, upon which a right of action was based upon the requirement of service for a longer period than that permitted by the Hours of Service Law. In this case, however, the court held that the plaintiff's right of recovery could only be based upon said law upon this subject which made penal the act of the employee in remaining on duty for a service in excess of the period therein prescribed. The court held that the participation by the plaintiff in the unlawful act of remaining on duty disqualified him from a recovery on the ground that he was a participant in the violation of law, and was therefore not entitled to call upon the defendant to indemnify him from an injury which the court held resulted from such unlawful participation.

That the Hours of Service Act is constitutional has been held in *United States v. Illinois Central*

*Ry. Co.*, 180 Fed. Rep. 630, and in *Wisconsin v. Chicago, M. & St. P. Ry. Co.*, 136 Wis. 407, 117 N. W. Rep. 686. A case is now pending before the Supreme Court in which reargument has been ordered, which involves the question of the constitutionality of the Hours of Service Act. *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 31 Sup. Ct. Rep. 621. See also the recent cases: *Black v. Charleston & W. C. Ry. Co.*, 69 S. E. Rep. 230; *Kansas City So. Ry. Co. v. Quigley*, 181 Fed. Rep. 190.

#### § 29. THE ASH PAN LAW.

Under the terms of the Employers' Liability Act a railroad company cannot plead the defenses of assumption of risk or contributory negligence in a suit for personal injuries received by an employee by reason of a violation of the provisions of the so-called Ash Pan Law of May 30, 1908, 35 Stat. L. 476, c. 225. This Act requires in terms that every locomotive engine engaged in interstate commerce shall be equipped with an automatic ash pan, self-dumping in its operation, which will permit the cleaning of the fire box and appurtenances without requiring the presence of a man or men beneath the engine. The full text of the statute will be found on page 333 of the Appendix, but as yet the law has never been adjudicated.

**§ 30. THE LOCOMOTIVE BOILER INSPECTION LAW.**

This law provides, *inter alia*, "That, from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

This statute clearly falls within the provisions of the Employers' Liability Act of 1908, inasmuch as in its title the purpose is manifested of promoting the "safety of employees and travelers upon railroads"; and while, of course, it has not been construed by the courts, it is only reasonable to assume that cases will arise for death or injury caused by its violation.

**§ 31. STATE STATUTES.**

While it is manifest that violations of federal statutes enacted for the safety of employees will

have the effect of barring the defense of contributory negligence and assumption of risk, it is by no means clear that the scope of these provisions of the law is limited to such federal statutes. The words "any statute" would seem naturally to include the statute of a State enacted for the safety of employees as well as a federal statute. In the *Johnson Case*, 196 U. S. 1, Chief Justice Fuller adopts the rule laid down by Mr. Justice Story in *United States v. Winn*, 3 Sumner 209: "In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature."

Tested by this rule it would seem that the manifest purpose of Congress to provide for the safety of employees and to compensate for casualties which overtake them while in the hazardous work of railroading, would best be promoted by an interpretation tending to require of the railroads a strict compliance with all laws, state and federal, enacted for the safety of employees.

The Employers' Liability Act of 1908 was enacted after Mr. Justice Brewer had written, in the dissenting opinion in the *Schlemmer Case*, 205 U. S. 1, 27 Sup. Ct. Rep. 407, that "the rule is well settled that while in cases of this nature a

violation of the statutory obligation of the employer is negligence *per se*, and actionable if injuries are sustained by servants in consequence thereof, there is no setting aside of the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statute, unless that statute is so worded as to leave no doubt that this defense is also to be excluded."

Evidently Congress had this expression in view when it expressly provided that such defenses should not be available where a statute is violated.

It was the rule which Mr. Justice Brewer laid down which Congress intended to change and abrogate. This rule manifestly applied generally to the violation of any statute, state or federal, which was in existence at the time of the injury. The violation of *any* "statutory obligation" was to be the basis of the denial of defenses otherwise available. This is a rule to compel compliance with a safeguard required by any legal enactment. It is a rule compelling care in safeguarding of the lives of railroad employees. It is a law which tends to enforce all laws enacted for the safety of employees. When negligence has reached the point of law-breaking, that is, the violation of any law, Congress evidently intended that the burden of the injuries resulting as its consequences should not be visited upon those who were powerless, but

upon those "who could measurably control the causes" of such injuries.

That Congress intended this interpretation may be gathered from the use of the term "any statute," and from the use of the term "any law" in the report of the Committee explaining this provision.

In the determination of the question of the provisions in sections 3 and 4, extending the liability of the carrier to any case "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of said employee," it may be noted that in the bill originally under consideration by the Committee, as proposed by Senator La Follette, the expression used was "where the violation of law by such common carrier, etc." This was made the subject of criticism before the Senate Committee on Education and Labor, February 21, 1908, and Charles J. Faulkner, Esq., counsel for the railroads, objected to this provision, and commented upon it as follows, page 43: "In other words, it takes from the carrier all defenses by proof that a law has been violated. The term law means a statutory law, a common-law principle, a rule or decision of a court that binds the carrier or any other provision of law, even the ordinance of a town. . . . If the Chairman will permit, I would submit to the lawyers of the Committee the proposition that there can be no action-



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On page 112 of this Report the following dialogue is noted:

"Senator BRANDEGEE. You would be satisfied if that provision of the bill which says that the company cannot take advantage of that defense in case they violate the law was modified to read 'any law passed for the protection of employees'?

"Mr. FULLER. Yes, sir.

"Senator BRANDEGEE. Something like that?

"Mr. FULLER. Yes, sir, Senator, that is all it was intended for, and I do not think it would be held to apply to such cases as were mentioned.

"Senator BRANDEGEE. I think it could be, as it is without limitation, and the word 'law' would be broad enough to cover an ordinance.

"Senator BORAH. It has been so held."

It may be fairly assumed that when the change was made from the bill as drafted to the language in which it was finally enacted, and the words "a law" were stricken out and the words "any statute" inserted, that this change was primarily made to relieve the Act of the criticism that, as originally drafted, it included any violation of law, common law, or statute, or even a municipal ordinance, and from this examination of the reports of the hearing before the committee, it seems plain that it was the intention of Congress that the words "any statute" should include any statute, state or federal.

If it had been intended to limit this provision to federal statutes alone, the language used, and which is generally used with such intent, would have been "any Act of Congress," as is apparent from the use of this expression elsewhere in the Act.

It is objected that this interpretation of the Act would render it constitutionally objectionable, as extending the federal rule to the limits of state legislation, or as making state legislation beyond the scope of federal power indirectly a part of the Federal Act, and that it admits a lack of uniformity in the regulations laid down in the Act by reason of the diversity of the statutes for safety as they exist in the different States.

These contentions seem to be fully met and answered by the opinion of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 207, where he says: "Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject." And at page 205, "The Acts of Congress, passed in 1796 and 1799 (2 U. S. L., p. 545; 3 U. S. L., p. 126) empowering and directing the officers of the general government to conform to and assist in the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. . . . Congress . . . has directed its officers to aid in the execution of

these laws; and has in some measure *adapted its own legislation to this object, by making provisions in aid of those of the States.* But in making these provisions, the opinion is unequivocally manifested, that Congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce." Congress may adapt its legislation to state statutes for safety upon identically the same grounds as justified such action as to state health and quarantine laws.

## CHAPTER VIII

### DAMAGES AND SUIT BY POOR PERSON

#### § 32. DAMAGES FOR PERSONAL INJURIES.

For personal injuries not resulting in death, the employee who has a right to recover under the Employers' Liability Act is entitled to recover for pain and suffering, for loss of employment for such time as the injury affects ability to work, for compensation for disfigurement or disability, and for expenses of nursing, medical and surgical attendance.

#### § 33. DAMAGES FOR DEATH PRIOR TO ACT OF 1910.

For a death as the result of an injury received prior to April 5, 1910, the measure of damages was the loss in money that such death of the employee caused to the beneficiaries, and as to such cases there was no survival of the cause of action for the pain and suffering or the expense to which the deceased employee had been subjected as a result of the accident. *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. Rep. 494; *Cain, Admx. v. Southern Ry. Co.*, U. S. Circuit Court, Knoxville, Tennessee, 1911.

**§ 34. AMENDATORY ACT OF 1910.**

Section 2 of the Act of April 5, 1910, amending the Liability Act of 1908, enacted that "Any right of action given by this Act to a person suffering injury shall survive to his or her personal representative for the benefit of the surviving widow, or husband and children of such employee, and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." In cases arising under this amendment, that is, in cases of death resulting from injury received subsequent to April 5, 1910, the beneficiaries are entitled to recover all the damages which the deceased employee suffered or to which he was subjected as the result of the injury, and in addition thereto such pecuniary recompense as may compensate the beneficiary for the loss of the support and sustenance resulting from such death. In estimating this amount the jury has the right to take into consideration the age of the deceased, his health, strength, and capacity to earn money.

Under the rule laid down by Mr. Justice Harlan in *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, the widow and young children who depend for support entirely upon the labor of a husband and father would be entitled to recover greater damages than would be the case if there were no widow

and children and if the next of kin were not solely dependent upon the deceased for support.

#### § 35. ANNUITY TABLES.

As was laid down in the case of *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. Rep. 494, "annuity tables may be considered by the jury in ascertaining the compensation the plaintiff is entitled to receive for the pecuniary injuries sustained by the widow and children by reason of the death of the intestate; but the jury may also consider the state of health of the intestate, his age, habits, occupation, and the likelihood of his being able to work during the period of his expectancy of life."

And in the case of *Cain, Admx. v. Southern Ry., ante*, in charging jury, District Judge Sanford said: "Now you have heard the evidence as to the expectancy of life of a man of the age of this man, based upon the mortality tables of the insurance companies, the data collected by the insurance companies. Those are admitted in evidence merely to aid you, and they are not to control you. They are simply based upon averages, and there is no certainty that any man will live the average duration of life. Those things are at the best probabilities, and a man's expectancy of life varies with his occupation. . . . And the first question for you to consider in that aspect of the case would

be in what sum of money would compensate . . . for the loss in money that may be reasonably said to have resulted through the death of the husband and father, and the test would be what sum in money paid in a lump sum at the present time would compensate for the loss of money that they had a reasonable expectation, under all these circumstances, of receiving from their husband and father, if the husband and father had lived. That obviously would depend upon a great many considerations: upon his wages, what he was receiving and probably would receive; upon the expectation of living that he had, how long he probably would have lived to have given them money, on how much he spent on himself as distinguished from what he spent on his wife and children, because, of course, the part of his wages that he would have spent upon himself would be entirely eliminated from your calculations; and then, too, it would depend upon the reasonable expectations that his widow and children had of receiving the money from him and their probable expectancy in life would have to be considered, how long they would probably live and how long the children would probably have received money from their father, which might depend upon whether the children were boys or girls. It depends upon a variety of circumstances. There is no hard and fast mathematical rule that can be

laid down. It is a matter that addresses itself to the sound common sense of the jury under all these circumstances."

#### § 36. SUIT BY POOR PERSON.

Taking cognizance of the fact that many plaintiffs are unable, by reason of their poverty, to pay the onerous expenses incident to proceedings in the United States courts, Congress, by an Act approved June 25, 1910, 61st Congress, Sess. II, c. 435, enacted:

"That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the Circuit Court of Appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such

writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action or appeal."

## PART TWO

### THE CONSTITUTIONALITY OF EMPLOYERS LIABILITY ACT OF 1908

#### CHAPTER IX

CONGRESS MAY REGULATE THE RELATION BETWEEN MASTER AND SERVANT ENGAGED IN INTERSTATE COMMERCE

##### § 37. CONSTITUTIONALITY OF THE ACT: IN GENERAL.

The constitutionality of the Employers' Liability Act of 1908 has been expressly upheld in *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. Rep. 494; *Fulgham v. Midland Valley R. Co.*, 167 Fed. Rep. 660; *Watson v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942; *Zikos v. Oregon R. & N. Co.*, 179 Fed. Rep. 893; *Colasurdo v. Central R. R. of N. J.*, 180 Fed. Rep. 832; *St. Louis, I. M. & S. Ry. Co. v. Conley*, 187 Fed. Rep. 949; *Bradbury v. Chicago, R. I. & P. Ry. Co.* (Iowa), 128 N. W. Rep. 1; *Owens v. Chicago G. W. Ry. Co.* (Minn.), 128 N. W. Rep. 1011.

In the following cases the constitutionality of the Act was upheld by implication: *Johnson v. Great Northern Ry. Co.*, 178 Fed. Rep. 643; *Roush v. Great Northern Ry. Co.*, U. S. Circuit Court,

E. Dist. of Washington, October 5, 1909; *Winfree v. Northern Pacific Ry. Co.*, 164 Fed. Rep. 698; *St. Louis, I. M. & S. Ry. Co. v. Hesterly* (Ark.), 135 S. W. Rep. 874.

But the constitutionality of the statute has been challenged on the following grounds:

- a. That Congress is without power to regulate the relation of Master and Servant;
- b. That the Act abridges the freedom of Contract;
- c. That the Act provides a discriminatory classification; and
- d. That Congress is without power to provide a remedy for injuries caused by intrastate servants.

These will be treated in their order, and under sub-division e of this discussion will be considered *seriatim* the principal objections to the constitutionality of the Employers' Liability Act of 1908 suggested by the Supreme Court of Errors of Connecticut, in the case of *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352.

#### **§ 38. REVIEW OF AUTHORITIES IN WHICH POWER OF REGULATION IS IMPLIED.**

That the Act regulates the relation between master and servant is not of itself a constitutional objection to its validity. Where necessary and proper in order to regulate and safeguard interstate commerce, Congress has the power to regu-

late the relation of master and servant engaged in that commerce.

Congress has acted upon this interpretation in a well-recognized code of specific regulations of the terms of the contract of employment in the merchant marine. Such regulations can only be supported by the power to regulate commerce. Congressional power to enact such legislation is sustained by the Supreme Court in the case of *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. Rep. 821.

Mr. Justice Story, in *Barque Chusan*, 2 Story, 455, 464, 465, said: "The power to regulate commerce includes the power to regulate navigation with foreign nations and among the States; and it is an exclusive power in Congress. This I conceive has been firmly established by the Supreme Court of the United States. (See *Gibbons v. Ogden*, 9 Wheat. 1, 193 to 198.) And the doctrine stands, as I conceive, upon grounds which cannot be shaken without endangering the interests of the whole Union, if not the very existence of the Constitution as a frame of government for the professed objects and purposes which it was intended to accomplish. Now, there cannot be a doubt that the prescribing of rules for the shipping of seamen and the navigation of vessels engaged in foreign trade, or trade between the States, is a regulation of commerce. In what re-

spect does the exercise of the power to regulate, control, or extinguish the liens given by the maritime law for material-men upon foreign vessels, differ from the power to regulate the shipping of seamen, or the navigation of foreign vessels? Each is a regulation of foreign commerce, or commerce among the States. . . .

The power of Congress to regulate the relation of master and servant, both being engaged in interstate commerce, is asserted by Mr. Justice White in the *Employer's Liability Cases*, 207 U. S. 463, 495, where he said: ". . . We fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce, or within the authority given to use all means appropriate to the exercise of the powers conferred."

Mr. Justice Moody, in his dissenting opinion in the same cases, stated that he agreed "entirely with all that was said in the opinion of Mr. Justice White in support of the power of Congress to enact a law of this general character." He further said, at page 526: "It would seem, therefore, that when persons are employed in interstate or foreign commerce, as the employment is an essential part of that commerce, *its terms and conditions*, and the

rights and duties which grow out of it, are under the control of Congress subject only to the limits on the exercise of that control prescribed in the Constitution. . . . ”

Attention is called upon this point to the decision in the case of *Adair v. United States*, 208 U. S. 161. In the majority opinion Mr. Justice Harlan, at page 178, in reference to the previous decision of that court in the *Employers' Liability Cases*, 207 U. S. 463, said: “. . . In that case the Court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce. . . . ”

And in his dissenting opinion in the *Adair Case*, above quoted, Mr. Justice McKenna said, at pages 182, 183: “In the inquiry there is necessarily involved a definition of interstate commerce and of what is a regulation of it. As to the first, I may concur with the opinion; as to the second, an immediate and guiding light is afforded by the *Employers' Liability Cases*, 207 U. S. 463. In those cases there was a searching scrutiny of the powers of Congress, and it was held to be competent to establish a new rule of liability of the carrier to his employees — in a

word, competent to regulate the relation of master and servant, a relation apparently remote from commerce, and one which was earnestly urged by the railroad to be remote from commerce. To the contention the Court said: 'But we may not test the power of Congress to regulate commerce solely by abstractly considering the broad subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of that power to regulate commerce.' In other words, that the power is not confined to a regulation of the mere movement of goods or persons."

And in the recent case of *Atlantic Coast Line R. Co. v. Riverside Mills*, 31 Sup. Ct. Rep. 164-168, Mr. Justice Lurton delivering the unanimous opinion of the court, said: "In the *Employers' Liability Cases*, 207 U. S. 463, power to pass an Act which regulated the relation of master and servant so as to impose on the carrier, while engaged in interstate commerce, liability for the negligence of a fellow servant, for which at common law there was no liability, and depriving such carrier of the common-law defense of contributory

negligence save by way of reduction of damages, was upheld."

The existence of this power of Congress over the subject of the relation of master and servant has again and again been asserted by the Supreme Court in cases where the validity of State legislation upon the same subject has been sustained "in the absence of legislation of Congress upon the subject." *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. Rep. 1176; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. Rep. 585; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136.

In the case of *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 31 Sup. Ct. Rep. 621, Mr. Justice Hughes said: "For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them. *Johnson v. Southern Pacific Company*, 196 U. S. 1, 25 Sup. Ct. Rep. 158; *Adair v. United States*, 208 U. S. 177, 178, 28 Sup. Ct. Rep. 277; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. Rep. 616;

*Chicago, Burlington & Quincy Railway Co. v. United States*, 31 Sup. Ct. Rep. 612. The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive tours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. *Chicago, Burlington & Quincy Railroad Company v. McGuire*, 219 U. S. 549, 31 Sup. Ct. Rep. 259.

"If then it be assumed, as it must be, that in the

furtherance of its purpose Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

**§ 39. IT IS A REGULATION OF TERMS AND CONDITIONS UNDER WHICH INTERSTATE COMMERCE IS MOVED.**

The regulation of master and servant as laid down in the Employers' Liability Act may be supported as a regulation of commerce:

Because it is a regulation of the terms and conditions under which employees move commerce. It is objected that the contract of employment of interstate employees of interstate carriers is not commerce, but is only incidental and auxiliary thereto. This logic would exclude the regulation of freight rates. The contract fixing compensation for carriage of freight is as incidental and as auxiliary to the commerce itself as fixing the terms of the contract of service in interstate commerce. If the contract with a railroad by the shipper for the service of the carrier in interstate transportation is a proper subject of federal regulation, and all admit that it is, why is not the contract with the railroad by the employee for

service in interstate transportation equally within the scope of the federal power?

The railroad moves interstate commerce, and its contract to move the commerce is within federal power when it contracts so to do with the passenger or the shipper. The employee moves interstate commerce, and his contract to move the commerce is within federal power when he contracts so to do with the railroad.

A contract to move commerce is commerce, whether made by a railroad with a shipper or by an employee with a railroad. If a contract to move commerce is not commerce, then the regulation of freight rates is beyond the scope of federal power.

The occupation of the employees of an interstate carrier is commerce. A regulation of that occupation is a regulation of commerce. State laws regulating commercial travelers have been declared void as regulating interstate commerce. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. Rep. 1.

The solicitation of orders from which commerce arises, or the making of contracts out of which commerce arises, is itself commerce. The business of interstate carriers is commerce and may be regulated. The occupation of employees of such carriers is commerce and may be regulated.

The contract in each case is a contract to move commerce, and all contracts in aid of the movement of commerce are within the congressional power of regulation. The train crew actually moves commerce. The telegraph operator, the bridge repairer, the switchman, and the yardman all assist in the movement of commerce, and that directly.

It seems to be clear from the opinion of Mr. Justice Brewer in *Chicago, R. I. & P. R. Co. v. Stahley*, 62 Fed. Rep. 363, that roundhouse employees putting a recently arrived engine in condition for immediate use and the work of track repairers "was work directly related to the movement of trains." Work directly related to the movement of trains when these trains are interstate must necessarily be work directly related to the movement of interstate commerce and within the scope of federal power.

#### **§ 40. IT FURTHERS A FREE FLOW OF COMMERCE BY PROMOTING INDUSTRIAL PEACE.**

The regulation of master and servant as laid down in the Employers' Liability Act may be supported as a regulation of commerce:

Because such regulation has such large relation to the promotion of industrial peace, and removes a potent cause of strife and strike which impedes a free flow of commerce between the

States. Such regulation is a correlative to the power asserted in the *Debs Case*, 158 U. S. 564, to exist in the national government to put down disorderly railroad strikes by force of arms. May not Congress, by well-considered legislation, remove the causes of industrial disturbance and prevent impediments to the movement of interstate commerce without resorting to the national forces after disorder has become manifest? The federal power of coercive action upon the subject of disorders growing out of industrial disputes between carriers and employees engaged in interstate commerce being admitted, *In re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, it naturally follows that legislation in redress of grievances and in prevention of strife and disorder tending prejudicially to affect the movement of interstate commerce may be enacted by Congress according to its view of the public policy involved.

The establishment of a legislative policy of justice to the men engaged in interstate railroad ing may be the highest statesmanship in the regulation of interstate commerce. It is wiser to permit freedom to the legislative power to establish just relations by law, rather than call upon courts and troops after conditions have become acute.

As the Supreme Court of West Virginia in sustaining the constitutionality of the Scrip Act, prohibiting laborers' wages being paid in other

than lawful money, *Peel Splint Coal Co. v. State*, 15 S. E. Rep. 1000, 1006, said: "Collisions between capitalists and the workmen endangering the safety of the State stay the wheels of commerce, discourage manufacturing enterprise, destroy public confidence, and at times throw an idle population upon the bosom of the community. Surely the hands of the legislature cannot be so restricted as to prohibit the passage of laws directly intended to prevent and forestall such collisions."

#### § 41. EMPLOYEES ARE INSTRUMENTALITIES OF INTERSTATE COMMERCE.

The regulation of master and servant as laid down in the Employers' Liability Act may be supported as a regulation of commerce:

Because employees are instrumentalities of interstate commerce and come within the well-known rule that Congress has the power to regulate such instrumentalities. As Mr. Justice Johnson said in his concurring opinion in *Gibbons v. Ogden*, 9 Wheat. 1, 230: ". . . The subject, the vehicle, the agent, and their various operations become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen are such vital agents of commercial prosperity that the nation which could not legislate over these subjects would not possess power to regulate commerce. . . ."

In *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. Rep. 436, Mr. Justice Harlan, delivering the opinion of the court, said: "Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress. No corporate person can excuse a departure or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence. . . . So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized secure by that instrument, its regulation of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all."

In the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826, Mr. Justice Field said: "The power [to regulate commerce] also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of

them which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet when they are national in their character and require uniformity of regulation affecting alike all the States the power of Congress is exclusive."

In *United States v. Freight Association*, 166 U. S. 290, 312, 17 Sup. Ct. Rep. 540, the Court said: "Railroad companies are instruments of commerce and their business is commerce itself. *State Freight Tax Case*, 15 Wall. 232, 275; *Telegraph Co. v. Texas*, 105 U. S. 460, 464."

#### § 42. RELATIONS BETWEEN COMPANY AND EMPLOYEE ARE NOT LOCAL.

The regulation of master and servant as laid down in the Employers' Liability Act may be supported as a regulation of commerce:

Because federal judicial power has been asserted by the Supreme Court over the subject-matter of the relations of master and servant upon the express ground that "it is obvious that the relations between the company and employee are not in any sense of the term local in character. . . . Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the States is a matter of national regu-

lation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution." *Baltimore and O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914.

#### § 43. HUMAN AGENCY IS MOST IMPORTANT FACTOR IN MOVEMENT OF COMMERCE.

The regulation of master and servant as laid down in the Employers' Liability Act may be supported as a regulation of commerce:

Because the power to regulate commerce among the States confers full, complete, and paramount authority on Congress to establish rules of conduct for such commerce, including rules governing and protecting the human agency involved in such commerce, which is by far the most important factor involved therein.

Congress is not confined to the mere establishment of rules as to the property involved in such commerce, but may without question establish rules of conduct for the protection and safety of human life involved.

This power has been exercised under the commerce clause with the purpose of conserving human life in the regulation of pilots and pilotage. The Court in *Cooley v. Port Wardens*, 12 How. 299, speaking of the power of Congress over pilotage under the commerce clause, said: "It extends to

*the persons who conduct it as well as to the instruments used."*

Again, in *Sherlock v. Alling*, 93 U. S. 99, Mr. Justice Field said of the commerce clause: "It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, *the persons engaged in it*, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels and by whom they shall be navigated; how they shall be registered, or enrolled and licensed; . . . Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.

"The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority."

Congress has full sovereignty over interstate commerce. In the exercise of that sovereignty, effective regulations may be made to cover every

aspect which has direct relation to such commerce. Its regulations are not confined to the inanimate factors or instrumentalities in the commerce over which it has control. Examples of this legislation may be found in those federal statutes enacted to "provide for the safety of crew and passengers by prescribing rules concerning boilers, engines, medicines, bulk, ventilation, and the like; also the number of the crew, or form and nature of their contract of hiring, their rights as against masters and owners; the powers of officers, etc. The number of such statutes is great and their particular objects are numerous. . . . No one has as yet questioned the authority of Congress to enact such laws." Pomeroy's Constitutional Law, § 381.

Story on the Constitution, § 1062, says: "If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government; it has been exercised with the consent of all America, and it has been always understood to be a commercial regulation. The power over navigation and over commercial intercourse was one of the primary objects for which the people of America adopted their government, and it is impossible that the

Convention should not have so understood the word 'commerce' as embracing it. Indeed, to construe the power so as to impair its efficacy would defeat the very object for which it was introduced into the Constitution; for there cannot be a doubt, that to exclude navigation and intercourse from its scope would be to entail upon us all the prominent defects of the confederation and subject the Union to the ill-adjusted systems of rival States, and the oppressive preferences of foreign nations in favor of their own navigation."

In the *Lottery Cases*, 188 U. S. 321, 356, 23 Sup. Ct. Rep. 321, Mr. Justice Harlan says: "In this connection it must not be forgotten that *the power of Congress to regulate commerce among the States is plenary*, is complete in itself, and is subject to no limitation except such as may be found in the Constitution."

The extent of this power of regulation may be seen from the statement of Mr. Justice Clifford in the *Dred Scott Case*, 19 Howard, 393, 614: "But it may be mentioned, in passing, that under this power to regulate commerce Congress has enacted a great system of municipal laws and extended it over the vessels and crews of the United States on the high seas and in foreign ports, even over citizens of the United States resident in China, and has established judicatures, with power to inflict even capital punishment within that country."

The fullness of congressional power over interstate commerce may be realized from an examination of the statutes in the exercise of the commerce power over maritime commerce which have been practically unchallenged from the earliest days of the Republic.

The power to regulate interstate commerce is as full and ample as the power of regulation of foreign commerce. *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. Rep. 415; *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. Rep. 40.

And, as Judge Trieber said in the case of *Watson v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942: ". . . it is now well settled that the power of Congress under the commerce clause is as complete upon the land [as upon the navigable waters of the United States]." *In re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900; *United States v. Colorado & N. W. R. Co.*, 157 Fed. Rep. 343. See also *Lancer v. Anchor Line*, 155 Fed. Rep. 433.

In the case of *Spain v. St. Louis & S. F. R. Co.*, 151 Fed. Rep. 522, 527, Judge Trieber said: "The expression of the court that contracts with sailors

for their services are exceptional in their character and may be subjected to special restrictions for the purpose of securing full and safe carrying on of commerce on the water must be understood to refer solely to the propriety of the legislation and not the power, for no one will contend now that the commerce clause of the Constitution grants greater power to Congress over the commerce carried on by water than that transported by land."

It has been settled, since *Gibbons v. Ogden*, 9 Wheat. 1, that the power to regulate commerce among the several States is granted to Congress in terms as absolute as the power to regulate commerce with foreign nations. The power to regulate commerce among the several States is vested in "Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. . . .

"It has truly been said, that commerce, as the word is used in the Constitution, is a unit, *every part of which is indicated by the term*.

"If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there is some plain intelligible cause which alters it."

Of the word "commerce" Chief Justice Marshall, in the same case, at page 193, said: "The word used in the Constitution, then, comprehends, and has always been understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'"

In interstate commerce on the land, railroading is in all its constitutional aspects the same as navigation of the sea.

The whole business and occupation of interstate railroading is within the congressional power of regulation.

As Mr. Justice Brewer said, in *In re Debs*, 158 U. S. 564, 590, 15 Sup. Ct. Rep. 900: "Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other."

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

In the fullness of its power and authority over commerce, Congress may regulate a carrier or any of its instrumentalities on sea or land; may regulate vessels, railroads, pilotage, locomotives, cars, and trains; may regulate the liabilities of ship-owners to shippers, and to seamen; may regulate the contract of employment of seamen; may regulate freight rates, car distribution, combinations of carriers in restraint of trade; may prohibit the transportation of commodities in the sale of which the carrier has direct interest; and generally may determine the policy and conditions under which

carriers shall conduct the business of interstate or foreign commerce. Therefore, there is no limitation of the power which excludes the regulation of the relation of master and servant when such regulation is found by Congress to be good public policy in the enactment of legislation under the commerce clause. The regulation of this relation, covering as it does the rights and duties and obligations and remedies of more than a million men engaged in the movement of interstate traffic, may be most important and salutary in its effect upon the free and unrestricted movement of commerce between the States. In many aspects labor is the most important factor in the movement of interstate commerce, and if legislation upon the rights, remedies, and obligations of the employees is beyond the power of Congress a vital factor in the movement of interstate commerce will be excluded from legislative control.

Unless a corporation employs servants it cannot act. The human element is the vital element in its operation.

A railroad corporation itself cannot move commerce. It can only move commerce through the *employment* of agents and instrumentalities. The employment, therefore, is an essential to any movement of commerce. The regulation of the employment, that is, the regulation of the contract of the only railroad agents who can make the movement

of commerce possible, is a regulation of commerce, for the reason that an employment contract is a condition precedent to any movement of commerce by a corporation.

To assume the right of Congress to regulate the corporation itself, which has only a formal existence as a legal entity, because such corporation is engaged in commerce and to deny to it the regulation of the human agencies who actually move the commerce seems highly technical and illogical. Unless Congress has full power to regulate all who engage in commerce, in any capacity, whether as agents, directors, or employees, the field of its power of regulation is restricted and the effectiveness of its full control over the subject-matter of commerce is impaired.

## CHAPTER X

### THE EMPLOYERS' LIABILITY ACT DOES NOT UNDULY ABRIDGE THE FREEDOM OF CONTRACT

#### § 44. THE CONTENTION OF THE RAILROAD COUNSEL.

It is objected by representatives of the railroads that the Employers' Liability Act is invalid for the reason that it is in violation of the Fifth Amendment to the Constitution of the United States. The Act, they say, is an invasion of the "freedom of contract" which is guaranteed as liberty and property by the Fifth Amendment. Their contention on this point is sustained by the Supreme Court of Errors of Connecticut in its opinion in the case of *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352. The declaration of the court in the Hoxie case is as follows: "It denies them [employees] one and all that liberty of contract which the Constitution of the United States secures to every person within their jurisdiction."

With due deference to the learning and ability of the counsel who made this contention and to the high standing of the court which sustained it, it is submitted that their position on this aspect

of the controversy is untenable. There are some conclusive reasons why their position cannot be sustained.

**§ 45. NO LIMITATION UPON POWER OF CONGRESS TO RESTRICT THE EXERCISE OF THE RIGHT OF CONTRACT.**

*No restriction is made in the Constitution which, when necessary to the exercise of its express powers, prohibits Congress from impairing the obligation of an executed contract, and therefore there is no limitation of its power to restrict the exercise of the right of contract.* — If Congress may impair the obligation of a completed contract, it would be a strange anomaly which would exclude from its power the right of interference with an inchoate contract, or the option, right or liberty to make a contract.

When an actual existent contract may be annulled by an act of Congress when its obligations come in conflict with the congressional enactment in the exercise of some express power of the Constitution, it seems to be a matter of grave doubt if the theoretical right of contract will be held to be a barrier to the exercise of congressional power which is otherwise constitutional. Constitutional prohibition against impairing the obligation of contracts is a prohibition upon the legislatures of the States and not upon Congress.

In *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. Rep. 170, 312, Mr. Justice Miller, delivering the opinion of the court, said: "It is no answer to say that it interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this as it does the States; and where the question of the power of Congress arises, as in the legal tender cases and in the bankruptcy cases, it does not depend upon the incidental effect of its exercise on contracts, but on the existence of the power itself." Other cases which seem also to point to the same conclusion are *Saterlee v. Matthewson*, 2 Peters, 380; *Legal Tender Cases*, 12 Wall. 457, 550.

It would seem, therefore, to be reasonably conclusive that the Constitution vests in Congress full sovereignty over any subject within its express powers, unlimited by the restraint which is upon the States, to impair the obligation of contracts, and that, therefore, the contention that an act of Congress invades the liberty of contract of an individual is no constitutional barrier to the exercise of legislation by Congress, which is otherwise constitutional.

Where Congress is clothed with power by any of the express provisions of the Constitution, its ample sovereign power over the subject-matter may not be limited or restricted by the citizen's private right of contract. The powers conferred

upon Congress are of too serious and grave importance to be subject to the exercise of a right of contract at the will of the citizen which would operate to the nullification of national power.

This was made so clear and conclusive by the decision of the Supreme Court in the *Legal Tender Cases*, 12 Wall. 457, 551, that the following quotation from the opinion therein would seem to settle the controversy upon this aspect of the question: "But, as already intimated, the objection misapprehends the nature and extent of the contract obligation spoken of in the Constitution. As in a state of civil society, the property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government and no obligation or contract can extend to the defeat of legitimate government authority."

#### § 46. THEORETICAL FREEDOM OF CONTRACT IS SOMETIMES AGAINST PUBLIC POLICY.

*Theoretical freedom of contract may be impaired by legislation where the parties do not stand on an equal footing, in order to prevent the exercise of power of one over another, to coerce the acceptance of onerous terms against the will and contrary to the real wishes of the other, or when*

*any public interest or public policy is prejudicially affected by such exercise of power.*<sup>1</sup>—In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, the Supreme Court said: “The legislature has also recognized the fact, which the experience of legislators in many of the States has corroborated, that the proprietors of these establishments and their operatives do not stand on an equality and that their interests are, to a certain extent, conflicting. . . . In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. . . . But the fact that both parties are of full age and competent to contract does not necessarily de-

<sup>1</sup> In the recent case of *Poli v. Numa Block Coal Company* (Supreme Court of Iowa), 127 N. W. Rep. 1105, Judge Weaver, delivering the opinion of the court, said:

“Notwithstanding the absolute liberty with which every individual legally endowed to enter into contract for his personal labor or service and his equal legal right to abandon such service at any time subject only to liability for damages in case such act be not justified, it is nevertheless true in practical life that poverty, scarcity of employment, dependent family, and other circumstances often impose moral compulsion upon the laborer to accept employment upon such terms and under such conditions as are offered him, and it is in recognition of this fact, as well as the further facts, that society has a direct interest in preserving the lives and promoting the well-being of all persons engaged in productive industry, that laws have been enacted to protect them against unnecessary hazard of injury by failure of employers to exercise proper care for their safety.”

prive the State of the power to interfere when the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself."

In *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, the Court said: ". . . It may be conceded that this right to contract in relation to persons or property, or to do business within the jurisdiction of the State, may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in the statutes."

That this inequality of standing of the parties is a basis for legislative interference with "freedom of contract" is recognized by the Supreme Court in the case of *Schlemmer v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. Rep. 407, in the opinion of Mr. Justice Holmes, where he said, speaking of a statute which has marked features of resemblance to the statute here under consideration: "Probably the modification of this general principle by some judicial decisions and by statutes like section 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist."

And Mr. Justice Bradley, in *New York Central R. Co. v. Lockwood*, 17 Wall. 357, justified a

legislative invasion of the "freedom of contract" between carriers and their shippers upon the ground of the inequality of standing of the parties, and said: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to haggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading or sign any paper the carrier presents; often, indeed; without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. . . . If the customer had any real freedom of choice, if he had any reasonable or practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrier in trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which

the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality."

Mr. Justice Stafford, in the case of *Potter v. Baltimore & Ohio R. Co.*, 37 Washington Law Reporter, 466, well stated the test as to the bearing of this question of "freedom of contract" upon the validity of this legislation when he said: "The real heart of the question is whether the circumstances and situation are such that the law-making body has a right to say that the contract is made between parties, one of whom has presumably an undue advantage over the other." And the same judge, in the case of *Goldenstein v. Baltimore & Ohio R. Co.*, 37 Washington Law Reporter, 2, said: "The theory of the statute seems to be that during the period when the relation of employer and employee exists or is in contemplation, the parties do not stand on a level, but that the employee or person applying for employment is subject to the undue influence of the employer, as the borrower is supposed to be under the like power of the lender in the matter of interest."

The real test is happily suggested by Professor Richard T. Ely in his "Outlines of Economics"

as follows: "True liberty is not simply the permission but the power to act freely."

In *Narramore v. Cleveland, C. & St. L. Ry. Co.*, 96 Fed. Rep. 298, 302, the Court said, speaking through Judge Taft: "The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute." In this same case Judge Taft quotes the case of *Baddeley v. Grannville*, 19 Q. B. Div. 423, in which the English court says, at page 426: "An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation, people may come to what agreements they like, but as to future breaches of it there ought to be no encouragement given to the making of an agreement between A and B, that B shall be at liberty to break the law which has been passed for the protection of A. If the supposed agreement come to this: that the master employs the servant on the terms that the latter shall waive the breach

by the master of an obligation imposed on him for the benefit of others as well as of himself, such an agreement would be in violation of public policy, and ought not to be listened to."

#### § 47. LIBERTY OF CONTRACT IS MERELY A COMMON-LAW RIGHT.

*Liberty of contract is not a right guaranteed by the Constitution and is not a vested right, but is, if not a mere economic right, merely a common-law right, which may be affected by the normal exercise of legislative power in the public interest.* — "Liberty of contract" is a misnomer. Contract is obligation. By every contract there is a subtraction from liberty.

"Liberty to contract" would be a more accurate expression of the meaning of those who use the term "liberty of contract."

There is much confusion in the use of this term. "Liberty of contract" is called property.

If it is liberty, it is not property. Liberty implies volition, which cannot be predicated of property.

If it is property, it is not liberty.

It may be doubted if the right known as "liberty of contract" is more than an economic right, which has its place and weight in argument upon questions of legislative policy. But it is not a fixed and determined constitutional right, which no power of legislation can invade or impair.

Congress is not even bound by the restriction upon the States forbidding the impairment of the obligation of actual contracts. Can it be that the right to contract is more sacred than the rights growing out of an existent contract which Congress in the exercise of its powers to regulate commerce may invade?

Is the right to contract property? The right to contract is a right which exists before the consummation of a contract. It is not a right to a contract. It is the mere option of one party to negotiate a contract with another, if that other is willing to contract. It is abstract and not concrete.

The right to contract is not a right in or to any particular contract, and cannot be a property right, because its possessor as such has no interest or right in or to any specific contract, or in or to any particular or defined property. It is too vague and intangible, and is, as the Supreme Court of Massachusetts said of "profits," "more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect." *Sawyer v. Commonwealth*, 182 Mass. 245.

The right to contract vests no right in any contract or to any contract. It is inchoate and indeterminate, and has no relation in itself to any particular contract, to any contract with any particular individual, and has no relation or applica-

tion to any particular property or even to any specific cause of action.

It lacks every element of property. This was clearly indicated by the declaration in the majority opinion in the *Slaughter-House Cases*, 16 Wall. 36, 80: "And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." And that the anticipated profits from a future or prospective contract cannot be deemed property seems to be indicated in the opinion in *Munn v. People*, 69 Ill. 80, 91: "Anticipated profits are not and cannot be held and regarded as property in the ownership or possession of him who owns the article out of which profits are expected to flow. The property is one thing, and remains untouched — the profits are not *in esse* and cannot be claimed as property. When it is said one is deprived of his property, the understanding is it has been taken away from him — he is divested of title and possession."

The right to contract may be properly regarded as no more than a part of the abstract economic liberty of action of the individual which under all systems of government may be

controlled by legislation. It is of the same quality as the freedom to trade, which the commercial power may regulate and restrain. It is like the freedom to eat and drink, which food laws and other statutory regulations may reach and control where the safety of the public so requires.

Sumptuary legislation impairing the freedom of the individual to buy and sell at his pleasure has long been sustained, and it never has been successfully contended that the right to buy, the freedom to contract, was any impairment of the constitutionality of such legislation.

The right to buy labor is no more sacred than the right to buy property. The right to buy property, when any large public interest is involved and governmental authority exists otherwise over the subject-matter, may be legislatively regulated without invasion of the liberty and property clause of the Fifth Amendment.

The right to contract is not so direct and specific a right as the right of an owner to build upon his own land. The latter is properly termed a property right, because it inheres to specific property. Yet where public interests are involved, as, for example, the public health or safety from fire menace, the most stringent governmental regulations are permissible even with *summary provisions* for enforcement. These laws stand on a basis of authorized legislative power, and there-

fore the provisions of the Fifth Amendment do not reach them.

No greater force and efficacy can be judicially attributed to the inchoate right to employ such labor as is willing to be employed than to the right of an owner to build on his own property.

This seems to be clearly indicated by an illustration used by Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. 1, at page 208: "A State, it is said, or even a private citizen, may construct lighthouses. But gentlemen must be aware that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief." If an owner of real estate may be "restrained" under the commerce power, it does not seem as if that power were inefficacious when it comes in conflict with the inchoate right of an individual to make any indefinite contract for labor he may be able to make, if he chooses to make it.

But if "freedom to contract" is either liberty or property, or both, it may be affected by legislation, if due process is provided in the Act. And

as the Act now under discussion provides for "due process," a regular hearing before a judicial tribunal, a trial by jury and all the formalities of "due process," the provisions of the Act are unaffected by the "due process" provision of the Fifth Amendment.

No shipper of freight can assert a "freedom of contract" as a ground of the free exercise of his will concurrently with that of the managers of a railroad to fix freight rates regardless of the power to regulate commerce. *New York Central R. Co. v. Lockwood*, 17 Wall. 357.

If "freedom of contract" is non-existent where a rate contract to move freight is in question, if the Fifth Amendment has no effect in such case, how can it be asserted where a labor contract to move traffic is in question?

In the above query it is of course assumed that in each case the legislative regulation is *otherwise* a reasonable exercise of the power existing under the commerce clause.

"Freedom of contract" is not a constitutional right. It is a matter of extreme doubt if anything more can be claimed for the right to contract than that it is a common-law right conferring upon the individual liberty of action which cannot be taken away except by some law passed in due conformity to the due process provision of the Constitution. If it is a mere common-law right,

it is not a vested right. There is no vested right in a rule of the common law, as was determined by the Supreme Court in *Munn v. Illinois*, 94 U. S. 113. At page 134 the Court said: "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at will, even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed and to adapt it to the changes of time and circumstances."

In *Bertholf v. O'Reilly*, 74 N. Y. 509, 524, the Court said: "The legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legislature may impose upon one man liability for an injury with which he has no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief in attaching legal responsibility and allow a recovery to be had against those whose acts contributed, although remotely,

to produce it. . . . It is an extension by the legislature of the principle expressed in the maxim—*'Sic utere tuo ut alienum non laedas'* to cases to which it had not before been applied, and the propriety of such application is a legislative and not a judicial question."

Where large questions of social economy of the State are affected, the legislature in its sound discretion may legislate according to its view of the public policy involved, unaffected and uncontrolled by the common-law rights of the citizen, if the physical liberty of the citizen is not violated and no right of the citizen to any specific property, real or personal, is invaded.

But legislation, if supported by express constitutional power otherwise, may authorize a violation of the personal liberty of the citizen or an invasion of the right of private property, if compensation for the property "taken" is provided in the Act, and if "due process of law" is provided in its execution.

And no abstract, intangible right not connected with physical liberty and not specifically related to property, real or personal, can in any manner be an impediment to the power of legislation where the subject-matter of the legislation is *otherwise within* the constitutional power of the State or nation.

An arrest is clearly within the scope of the

Fifth Amendment. Yet arrests are authorized without violation of the Fifth Amendment whenever legislation otherwise constitutional authorizes arrest as a penalty for its violation. If the Fifth Amendment does not avail as a protection against the physical invasion of actual liberty, how unavailing constitutionally must it be when only a theoretical and intangible right is involved, even though such right may be called a "right of property"?

In *Moyer v. Peabody*, 212 U. S. 78, 84, 29 Sup. Ct. Rep. 235, Mr. Justice Holmes, delivering the opinion of the court, said: "But it is familiar that what is due process of law depends upon circumstances. It varies with the subject-matter and the necessities of the situation. Thus, summary proceedings suffice for taxes and executive decisions for exclusion from the country. *Murray v. Hoboken Land & Improvement Co.*, 18 How. 272; *United States v. Ju Toy*, 198 U. S. 253, 263, 25 Sup. Ct. Rep. 644. . . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

If this position of the court in the *Moyer Case* is tenable, may it not with much greater force be said in a case not involving the actual liberty of

the person, as the *Moyer Case* did, but only involving an abstract theoretical right to freedom of contract, that when it comes to a decision by the nation through its legislative department, upon a matter involving the safety of human life, the ordinary right to be free to contract must yield to what the nation, through its legislature, deems the necessities of the situation?

**§ 48. THIS ACT FREES EMPLOYEE FROM THE  
BURDEN OF AN ONEROUS LEGAL FICTION.**

*This particular legislation aims to permit the employee to sell his personal services to an interstate railroad free from the extraneous and fictitious condition attached to every contract of employment by legal construction not assented to by the parties, that the workman shall assume the risk of the manifest perils of his employment and thus the Act in its primary provision permits a freedom from the operation of an onerous legal fiction, and relieves from a contractual assumption never assented to by the employee. The injustice of the release of the employer, under the rule of assumption of risk as judicially established, having been made apparent to the legislature, it had the right to prohibit private contracts intended to continue the injustice which the law was enacted to terminate.—“Liberty of contract” is strangely out of place as an objection to this particular legislation. This legisla-*

tion aims to leave the employee free to sell his personal services to an interstate railroad without any conditions attached thereto by a fiction or construction of law. The employee never expressly assumes the risk of the perils of the employment, including the peril of injury by a fellow-servant. The assumption of this risk is a legal fiction arbitrarily placed upon his contract by the courts. Thus, if the objection arising under the doctrine of "freedom of contract" is effective for the destruction of this statute, the employee's *freedom of contract* is made to accomplish the creation of an obligation contrary to his interests and against his wishes. Thus in the name of "freedom of contract" he is compelled to work under the terms of a contract which he expressly repudiates. To insist upon "freedom of contract," to prevent relief from the consequences of a contract never made by the railroad men, and existing only by a legal fiction, would be the consummation of a great legal wrong.

In the report of the English Parliamentary Committee, which reported the original Employers' Liability Act of 1880, Mr. Lowe, the Chairman of the Committee, says: "The contract which the judges have assumed to be entered into by every operative, involving, as it does, the cession of most important rights without any consideration, is utterly unknown by the person to

be bound by it, and was, to its fullest extent, unknown to the judges themselves." Mr. Lowe characterizes the insertion of the assumption of risk into the contract of employment as "an extraordinary stretch of judicial legislation," and he says that it is to be regarded "with the utmost jealousy and dissatisfaction," as it alters the common law "not in any abstruse or remote point, but in a matter which most nearly concerns the interests of hundreds of thousands of Her Majesty's subjects." In the same parliamentary report Justice Brett is quoted: "I say now that the law is that you cannot properly import any condition or stipulation into a contract except one which in the minds of all reasonable men must have been in the contemplation and intention of both parties to the contract at the time it was made." And yet it is soberly suggested that "freedom of contract" is a reasonable ground upon which to base the perpetuation of a contract never made by the workman and existing only by the requirement of the judges. It cannot be that the policy adopted by the courts to compel those who embark in perilous work to assume danger of death or injury from the fault of others can be forced perpetually upon the workmen against their wishes and against the legislation of Congress, intended to relieve them from its injustice, upon any ground which can properly be charac-

terized as freedom or liberty of any kind or name.

When a railroad man engages to work as engineer or trainman, he is selling his services and no more. The company is buying his services and no more, but the common law has artificially affixed a condition to the contract of employment that when the employee sells his services he must risk life and limb if the manifest perils of the employment require it. By the contract of the parties, nothing passes from the employee but his services. The contract judicially superimposed upon the parties requires by implication the passing to the employer of the right to conduct his business in a manner manifestly perilous to the employee, and without re quital to kill or injure the employee by means of the manifestly perilous manner in which the business is conducted. It may be a harsh method of stating the doctrine as laid down by the courts at common law to say that when the workman undertakes to sell his services the court compels him to place his life or limb at the peril of the master's business, or to say that the sale of personal services in a contract of employment involves the sale of the life or limb of the employee if the manifest perils of the master's business require it. But that is a much more correct method of stating the effect of the judicial contract than the expression the common

law used, that the employee voluntarily assumes the risk of the manifest perils of the business. And it is to be remembered that this artificial term of the contract judicially affixed thereto is one from which the servant can in no manner escape. Courts say he may leave the particular employment if dangerous, but the same condition attaches in any employment in which he may engage. That the doctrine commonly called assumption of risk exists entirely by legal deduction and is attached to the contract of employment merely by artificial construction, attention is called to the statement of Lord Benholm in *Gregory v. Hill*, 1869, 8th Sc. Sess. Cas., 3d Series, p. 282: "I am free to admit that I think the explanation given of this limitation is a very unsatisfactory and artificial one — a supposed contract between master and servant, that the latter should not claim damages in such a case. Can there be anything more artificial?"

Hawkins, J., in *Thrusell v. Handyside*, L. R. 20 Q. B. D. 359, 364, said: "If the plaintiff could have gone away from the dangerous place without incurring the risk of losing his means of livelihood, the case might have been different; but he was obliged to be there. His poverty, not his will, consented to incurring danger."

Cockburn, C. J., in *Woodley v. Metropolitan District R. R. Co.* (1877), L. R. 2 Exch. Div. 384,

at p. 389, said: "Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible. . . . The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed."

For a court to insist upon the workman's "freedom of contract," to force upon him a judicial contract which he repudiates, is illogical and manifestly unjust. It does not tend to promote popular respect for the courts to assign "freedom of contract" as a ground for the judicial compulsion of a contract never made by the parties and distinctly repudiated by one of the parties thereto. All intelligent men know that the "freedom of contract" here granted by this decision, to quote the words of a recent writer, "gives them [the workers] their precise opposites as ironic forms of personal liberty." As the writer just above quoted, George W. Alger, in "Moral Overstrain," 1906, at page 170, says: "The enormously increasing number of railroad accidents in this country, compared with other countries, has attracted much attention. The great number of deaths thus occasioned are of railway employees; but there are enough passengers killed every year to make the legal status of the railway employee, as regards his right to

safety while at work, important to the public, as well as to him and his fellows. The safety of the railroad employee is too closely bound to that of the passenger to be separated in the eyes of the law. When the collision comes, the engineer may die first, but the passengers are there in the cars right behind him.

"These two illustrations might be multiplied, but further examples would add little. The workman does not want the vain liberty, so often declared to him by the courts, of throwing up his job and looking for another. He does not take kindly to the judicial affirmations to him of the right to be maimed without redress, or to be killed, by his employer's indifference to his safety. His grievance is not directly with the courts and law. The workman knows little about the law, and most of what he understands he does not like. He objects to the economics on which these killing decrees are rendered against him. He does not call it economics, but at the bottom the real trouble from the workman's point of view is the blindness of the courts, which do not seem to notice or to understand the social and economic conditions under which he has to work. For the law still embodies in these decisions an outworn philosophy, the old *laissez faire* theory of extreme individualism. This theory resolutely closed its eyes to all common, obvious, social, and economic

distinctions between men, considered either as individuals or as classes, and with self-imposed blindness imagined rather than saw the servant and his master acting upon a plane of absolute and ideal equality in all matters touching their contractual relation; both were free and equal, and the proper function of government was to let them alone. If the servant was dissatisfied with the conditions of his employment; if the dangers created, not merely by the necessities of the work, but by the master's indifference to the safety of his men, were in the eyes of the latter too great to be endured with prudence, then, being under this theory a free 'agent' to go or stay, if he chose to stay, he must take the possible consequences of personal injury or death.

"To the workingman of to-day this theory embodies the liberty of barbarism,—the 'freedom' of the Stone Age. This freedom is to him not liberty, but injustice."

The suggestion of "freedom of contract" for the railroad men in such a connection is as perilous to public interests and public policy as it is unfair, unreasonable, and unjust in its consequence to the men involved.

"Freedom of contract" is the basis of the denial of the right of the legislature to give relief. Courts cannot give the relief, because they are bound by the doctrine of *stare decisis*.

Therefore the workmen are notified that no relief is open to them except by their own initiative.

The workmen are ironically told that they are perfectly free, as superior men, to obtain a contract from their employer which no employer will grant, and which no employer in all economic history ever granted.

The workmen are told by the courts that they have "freedom of contract" to induce the employer to voluntarily assume the burden of industrial accidents.

No sane man can expect that employees will find any remedial results from this "freedom of contract" if the employee acts individually.

If the million and a half railroad men are to continue employed as railroad men, this doctrine closes every door to compensation for injury.

But if they act collectively and refuse to work until the objectionable term is removed from contracts of employment by express and formal renunciation by the employer of the provision the courts have attached to such contracts, then we have the exercise of the "freedom of contract" by the employee.

This means a strike, and can mean nothing else.

Assent to this doctrine by the courts would block every other avenue of relief.

§ 49. THIS DOCTRINE HAS NOT IMPAIRED LEGISLATION FORBIDDING CONTRACTS TO AVOID THE CONSEQUENCES OF NEGLIGENCE IN HANDLING FREIGHT.

*The doctrine of liberty of contract has not been applicable to impair legislation forbidding carriers to contract to relieve themselves from the consequence of negligence of them or their agents where satisfaction for damage or delay to shipments of freight was the subject-matter of the contract and therefore it is not reasonable to suppose that it can be a barrier to legislation, the subject-matter of which is satisfaction for fatal or other injury to men.* — From the cases of *New York Central R. Co. v. Lockwood*, 17 Wall. 357, and *Baltimore & Ohio S. W. R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, and cases cited, it is clear that carriers by railroad are not permitted to relieve themselves from liability for negligence of their servants or agents resulting in loss or damage to shippers or injuries to passengers. This rule has been judicially established in its application to shippers and passengers. Can it be possible that there is not legislative power to make similar limitation upon the right to contract in cases which involve injuries to men employed by railroads? The whole subject seems to be disposed of by Mr. Justice Peckham in the case of the *Addyston Pipe & Steel Co. v. United*

*States*, 175 U. S. 211, 20 Sup. Ct. Rep. 96, for reasons which seem to be satisfactory and conclusive, when he says: "Regulation to any substantial extent, of such a subject by any other power than that of Congress, after Congress has itself acted thereon, even though such regulation is effected by means of private contracts between individuals or corporations, is illegal, and we are unaware of any reason why it is not as objectionable when attempted by individuals as by the State itself. In both cases it is an attempt to regulate a subject which, for the purpose of regulation, has been . . . exclusively granted to Congress, and it is essential to the proper execution of that power that Congress should have jurisdiction as much in the one case as in the other."

#### § 50. THIS DOCTRINE CANNOT IMPAIR AN EXPRESS LEGISLATIVE POWER.

*Where express power exists over any subject-matter, the exercise of legislative power upon that subject is not impaired by the freedom of contract of the individual.* — If legislative power otherwise exists over the subject-matter of legislation, there is no constitutional "liberty of contract" standing in the way of its exercise. If legislative power does not exist over the subject-matter, legislation is invalid without the invocation of a constitutional "liberty of contract." So validity of legislation

in no manner depends upon liberty of contract. Any statute otherwise valid is not void because it impairs "liberty of contract." Cases in which this right of "liberty of contract" have been discussed were cases not supported otherwise by valid legislative power. For example, in *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. Rep. 277, the court held that there was "no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part." Having thus determined that the legislation under discussion in the *Adair Case* was not a valid exercise of power under the commerce clause, there seems to have been little relevancy in the discussion indulged in upon the question of "liberty of contract." If the Act was not a regulation of commerce, it was beyond the power of Congress.

Also, in the case of *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, the legislation then before the court fixing the hours of labor for bakers in New York was declared to be unconstitutional because it was not a valid health regulation and had no other basis in any recognized power of government. It would seem, therefore, that no invocation of the doctrine of

"liberty of contract" was essential to the decision of the case, and that health, safety, commerce, and revenue laws, and statutes of frauds are valid without reference to "liberty of contract."

Valid regulations of commerce are not affected by this doctrine. *United States v. Joint Traffic Association*, 171 U. S. 505, 573, 19 Sup. Ct. Rep. 25, *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228, 229, 20 Sup. Ct. Rep. 96; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. Rep. 272; *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. Rep. 428. See also article by Richard Olney, 42nd American Law Review, 161.

In the case of *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. Rep. 96, the Court unanimously said: "But it has never been, and in our opinion ought not to be, held that the word [liberty] included the right of an individual to enter into private contracts upon all subjects, no matter what their nature, and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an Act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above

nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the States."

In *Patterson v. Kentucky*, 97 U. S. 501, the court said: "It [the court] has, nevertheless, with marked distinctness and uniformity, recognized the necessity growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens."

Legislation within the limits of the powers of government to protect the safety, health, peace, good order, and morals of the community, and which is in each case a legitimate and normal exercise of the power to protect the community in such respects, is not at all vitiated by any private right of contract. *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13; *Patterson v. Ken-*

*tucky*, 97 U. S. 501; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383; *St. Louis, I. M. & St. P. R. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. Rep. 419; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. Rep. 1; *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358. See also, as to validity of legislation under express legislative power which invades the private right of contract, *Union Pacific Ry. Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. Rep. 970; *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. Rep. 586.

That legislation may restrain, regulate, and control those engaged in a particular occupation, in the exercise of that occupation, seems to be clearly and indubitably established by the majority opinion in the *Slaughter-House Cases*, 16 Wall., at page 80: "The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the

existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal Government."

This strong statement of the majority of the court is emphasized by the fact that the minority opinions in the same case urged the doctrine now sought to be engrafted upon our Constitution. Mr. Justice Field, page 106, cited from a Circuit Court decision, *Live Stock Association v. Crescent City Co.*, 1 Abbott's U. S. Rep. 399: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner." Mr. Justice Bradley, page 116, said: "A calling, when chosen, is a man's property and right." Mr. Justice Swayne, page 127, said: "Labor is property, and as such merits protection. The right to make it available is next in importance to the rights to life and liberty."

It may be remarked in passing, as bearing upon the validity of the Employers' Liability Act, which confers a right to his life upon the railroad employee, that the remark just quoted from Mr. Justice Swayne follows his declaration that "life is the gift of God, and the right to preserve it is the most sacred of the rights of man."

The right of a citizen to contract, or his liberty and freedom to contract, is not superior to the rights and powers of a State. And yet even

though legislative power over a subject-matter is within the reserve powers of the State or within the police power of the State, that does not impair the paramount right of Congress to act upon that subject-matter in the execution of any of the powers delegated to Congress by the Constitution of the United States. As was said by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 210, 211: "The nullity of any Act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of Congress made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the Act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

Like the rights of States, the rights of citizens are controlled, impaired, and governed by legislation of Congress when such legislation is within the express or implied powers conferred by the Constitution.

The right to contract, like the right to construct lighthouses on one's own land, *Gibbons v. Ogden*, 9 Wheat. 1, 208, may be restrained if in conflict with the due and proper regulation of commerce.

In a recent case decided by the Court of Appeals of the District of Columbia, *McNamara v. Washington Terminal Company*, 35 App. D. C. 230, involving the constitutionality of the federal Employers' Liability Act, the court made a careful analysis and review of the objection made to the statute that it invades the "freedom of contract." Upon this subject the Court said: "That the right of contract is subject to many limitations imposed in the interests of the general public, or, to preserve the public health, morals, or safety, is of course not denied. The decisions of the Supreme Court of the United States are replete with declarations to that effect. In *Munn v. People of Illinois*, 94 U. S. 113, a statute fixing the maximum charges for the storage of grain and prohibiting charges for larger amounts was sustained. A California statute making it unlawful for employees to work in laundries between the hours of 10 P. M. and 6 A. M. met with the approval of the court in *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730. In *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. Rep. 586, an Act of Congress limiting the fees of attorneys prosecut-

ing pension claims was held to be within the police power. The Court said: 'It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligation, except for the necessities of existence; to the *common carrier* the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy.' *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, involved a statute of Utah regulating the hours of labor in mines. Speaking of the right of contract, the Court said: 'This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous or so far detrimental to the health of employees as to demand special precautions for their well-being and protection or the safety of adjacent property.' In dealing with the capacity of the parties to contract, the Court observed: 'But the fact that both parties

are of full age and competent to contract does not necessarily deprive the State of the power to interfere, where the parties do not stand upon an equality or where the public health demands that one party to the contract shall be protected against himself. "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the State must suffer." After a full review of the adjudged cases, the Court held the statute to be a valid exercise of the police power of the State. An Act of the legislature of the State of Tennessee requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in lieu of wages was held, in *Knoxville Iron Company v. Harbison*, 183 U. S. 13, 22 Sup. Ct. Rep. 1, not to be in conflict with any provisions of the Constitution of the United States relating to contracts. A statute of the United States prohibiting the payment of seamen's wages in advance was held to be within the power of Congress in *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. Rep. 821. *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358, involved a law of that Commonwealth making vaccination compulsory in the discretion of a board of health in a city or town. The Court, in sustaining the law,

said: 'The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.' The legislature of Arkansas enacted a law making it unlawful to screen coal before weighing it for payment of miners' wages. This law was sustained in *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. Rep. 206. The Court said: 'The mere fact that the court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.'"

The latest expression of the Supreme Court upon this subject is the unanimous opinion delivered by Mr. Justice Hughes in the case of *Chicago, Burlington & Quincy Railroad Co. v. McGuire*, 31 Sup. Ct. Rep. 259. In this case the Court said that the right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern, as, for example, the regulation of commerce with foreign nations and among the several States. *Addyston Pipe & Steel Co. v.*

*United States*, 175 U. S. 228, 231, 20 Sup. Ct. Rep. 96; *Patterson v. Bark Eudora*, 190 U. S. 174, 176, 23 Sup. Ct. Rep. 821; *Atlantic Coast Line Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. Rep. 164; *Louisville & Nashville R. Co. v. Mottley*, 31 Sup. Ct. Rep. 265.

It is subject also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances. Thus, in addition to upholding the power of the State to require reasonable maximum charges for public service, *Chicago, Burlington & Quincy R. Co. v. Iowa*, 94 U. S. 155; *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 348, 349, 388, 391, 1191; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. Rep. 192; and to prescribe the hours of labor for those employed by the State or its municipalities, *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. Rep. 124; the Supreme Court has sustained the validity of state legislation prohibiting the manufacture and sale of intoxicating liquors within a State, *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13; prohibiting the sale of cigarettes without license,

*Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. Rep. 633; prohibiting contracts for options to sell or buy grain or other commodity at a future time, *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. Rep. 425; and prohibiting the employment of women in laundries more than ten hours a day, *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. Rep. 324.

The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; *but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review*. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

It would seem clear that if an enactment had no relation to any subject-matter properly within legislative power, no invocation of any freedom of contract was essential to its judicial overthrow.

The declaration by the Supreme Court in the *McGuire Case*, 31 Sup. Ct. Rep. 259, that "where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review," seems logically to point to this conclusion, that if a law is valid and based upon some legislative power thereto enabling, "liberty of contract" is immaterial.

If it is void for lack of legislative power over the subject-matter of the enactment, freedom of contract is unavailing.

Hence it follows that liberty of contract can in no manner afford a test in and of itself of the validity of legislation. Such validity in no manner depends upon whether or not it invades the liberty of contract.

The case of *Louisville & Nashville R. Co. v. Motley*, 31 Sup. Ct. Rep. 265, holds that an existing contract, valid when made, may be rendered null by legislation of Congress within its power under the commerce clause.

This seems to foreshadow the end of liberty of contract as an objection to the validity of legislation.

**§ 51. THIS DOCTRINE IMPORTS A DANGEROUSLY  
LOOSE CONSTRUCTION OF THE CONSTITUTION.**

Speaking in general terms of the doctrine of "liberty of contract," it may not be out of place to say that the school of constitutional construction which would make "liberty of contract" a constitutional right is by no means a school of strict construction of the Constitution. Nor is it a construction preservative of the Constitution. It does not even serve the purpose of its defenders to conserve property interests.

It is a loose construction, for it adds to the Constitution a meaning never intended by its authors, a meaning not within the natural interpretation of its provisions, and a meaning which a majority of the Supreme Court in the *Slaughter-House Cases* expressly repudiated.

The fathers of the Republic founded a government "of the people, for the people, and by the people." Through chosen representatives responsible to the people the laws were to be made. And legislative power was not meant to be subordinated to the guardianship of a co-ordinate department of the Government. Limits there are to the exercise of legislative power, but they are expressed in the Constitution and are not to be judicially created.

A court to-day may give emphasis to the right to contract. Another court to-morrow differently con-

stituted may place the emphasis upon the right of the people to live, and the right to all the means necessary to enjoy the right to live. This would open a breach in the Constitution wide enough to justify the most radical schemes of socialistic experiment.

A court to-day may enlarge upon the natural right, the sacred right, of contract, and having added to the fundamental charter of government a provision for the protection of what the court believes to be a natural right of man, what is there to prevent a future court from adding to the instrument such rights as Tolstoi asserts to be the natural rights of man? If the door is opened to the judicial protection of rights not specified in the Constitution, then the judicial view of the future as to the limits of the natural rights of men is of more importance than the words of the Constitution.

Thus, those courts which are foremost in expressing their zeal for the protection of property, and which are at the same time most eager to recognize a constitutional guarantee for the preservation of the right of contract, are unconsciously paving the way for a loose construction of the Constitution which may be made the basis for a justification of collectivism in government. The advocates of the wildest socialistic schemes of government base their claims upon the identical

ground adopted by this modern school of judicial thought, the natural, sacred, and inalienable rights of men.

So, in the interest of property those courts are unconsciously opening a way for constitutionally changing in the most radical manner the rules of law under which such property is at the present time enjoyed. The logical conclusions deducible from their enunciations countenance an economic doctrine destructive of the very object they are seeking to preserve.

## CHAPTER XI

### THE ACT DOES NOT CREATE A DISCRIMINATORY CLASSIFICATION

#### § 52. THE CONTENTION OF RAILROAD COUNSEL.

The Committee appointed by the Conference of Railroad counsel which convened in Atlantic City, N. J., July 13, 14, and 15, 1908, in their "Report on the Questions arising under the Employers' Liability Act," says, page 64: ". . . it would seem to be clear that the Act is unconstitutional because,

"(1) It includes within its provisions interstate employees of railroads alone, and, in consequence, it does not bring within this class all employees similarly situated, namely,

"(a) The interstate employees of other interstate carriers, and,

"(b) The interstate employees of all other persons engaged in interstate commerce.

"(2) The language of the Act includes within its terms not only those railroad employees whose occupations are attended by the hazards peculiar to railroading, but also all other employees of railroads whose occupations are in no wise attended with such hazards;

"(3) The Act includes within its terms one class only of interstate employers, to wit, railroads; and this without regard to the hazards of the employment."

### § 53. DOCTRINE OF COMMON EMPLOYMENT INVOLVES SAME CLASSIFICATION.

It is objected that all employees of railroads cannot be classified together. To this it may be answered that for more than half a century the railroads themselves have invoked the same classification under the "doctrine of common employment." Ever since the decision in the case of *Farwell v. Boston & Worcester R. Corporation*, 4 Metc. 49, the courts have held that the same common employment provided a proper classification for a denial of the right of recovery in case of personal injuries to employees.

Baron Alderson in *Hutchinson v. York, N. and B. R. Co.*, 5 Exch. 343, stated that the defense of fellow-service was applicable to any servant "whenever he is *acting in the discharge of his duty as the servant of him who is the common master of both.*"

The common law denied a remedy to one in the service of the same master without any question of the propinquity of danger in his own particular line of general service for the reason that he was within the general service of his em-

ployer, and so obliged to assume all risk of injury from the manifest perils of the master's business, including the risk of injury from the negligence of fellow-servants. It was the peril of the master's business he was obliged to assume. His assumption of risk was not limited to the manifest perils of his own particular line of work for which his service was engaged, but it included all perils which were incident to the master's business.

The master was immune for injury to any of his servants caused by the negligence of any other of his servants within the general scope of the master's business in which both servants were employed. For example, a painter engaged to work as an employee of a railroad, and who was engaged in painting a railroad building beside the track, not only assumed the risk of any injury accruing to him which would naturally arise from the particular work in which he was engaged, but he also was obliged to assume the risk of injury from any other branch of the service of the same common master, the railroad. If, while engaged in painting, he was injured by a train on his employer's railroad leaving the track and overturning his ladder, he had no remedy.

Thus a class was judicially established to all of whom was denied the right to recover for personal injuries under circumstances which gave rise to an action in favor of all not within the excluded class.

This line of classification was clearly pointed out by Justice Field in *Chicago, Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, as follows: "The general liability of a railroad company for injuries, caused by the negligence of its servants, to passengers and others *not in its service*, is conceded. It covers all injuries to which they do not contribute. *But where injuries befall servants in its employ, a different principle applies.*" Those judicially classed together under the above rule, it is now asserted, cannot be *legislatively* classed together.

Now it is urged that a railroad employee who in his particular occupation is not ordinarily subjected to the extreme hazards of the master's business must, if at any time he be overtaken by any of those hazards, be denied a remedy, and that it is unconstitutional for the legislature to provide a remedy in such case.

The logic which included him in the general service of a common master to deny him a remedy at common law is now reversed in an endeavor to invalidate an act which follows the line of inclusion established and existing at common law.

Considering the question of classification merely, is it possible that there can be a valid *judicial* classification excluding all in the class from a remedy at law and that the same classification is invalid in *legislation* permitting a remedy?

Can there be a constitutional right requiring the segregation of those not in the hazardous occupations of railroading from those directly connected with such service, when a *legislature* acts, and yet no constitutional right to the same segregation when a *court* rules that all employees as a class are without a remedy merely because they are in the same common employment?

Employees who have been judicially unified and classified so as to exclude them from remedy should not, when legislation has granted a remedy to them all as the same class, be thereafter judicially segregated for the purpose of perpetuating the denial of remedy. Such alternate unification and segregation; always to deny a remedy to employees, would be a reproach to which the courts will not subject themselves.

Those who criticise this legislation on the ground that its terms are too inclusive, as extending a remedy to *all* employees of interstate railroads, seem to forget that it is the rule of common employment which is under consideration. Under this rule of common employment all employees who were engaged in the same *general* employment and who derived their authority and compensation from the same source were fellow-servants.

All in the same common employment were by the common law *denied* the remedy given others

under like circumstances. All in the same common employment may by a statute become entitled to a remedy which the common law denied. In each case the classification is identical.

Now, the remedy may be as comprehensive as the evil it seeks to meet, provided always that the legislative power is constitutionally ample to reach that evil. The courts, therefore, where legislative power over the subject-matter is otherwise admitted to exist, will scarcely condemn as unconstitutional a legislative act based upon the very classification which they have themselves judicially created and sustained.

The argument against the legislative classification in the Employers' Liability Act of 1908 is an open attack upon the "equality," the "due process," and the "arbitrary" character of the rule of common employment, established by the courts in conformity with the wishes of defendant railroads. For the rule of common employment is open to all the constitutional objections which are so strenuously urged by railroad counsel against the validity of this legislation. If these particular objections are tenable, then they apply to the common law, which must thereby fall.

In other words, if it is an unconstitutional classification, as now urged by railroad counsel, to include in a legislative Act all who are in the service of the same railroad company, the classi-

fication established in the judicial rule, excluding from a remedy *all* who serve the same common master, is unconstitutional.

If these contentions are well grounded, it seems to be logically inevitable that to deny to all employees as a class a remedy which is given by law to all others than employees, is "arbitrary classification," is "unequal," and is a denial of "due process of law."

#### § 54. EQUAL PROTECTION OF THE LAW CLAUSE DOES NOT RESTRAIN NORMAL EXERCISE OF GOVERNMENTAL POWER.

The whole contention that the Act of 1908 offends against the equal protection of the law clause of the Constitution is conclusively disposed of by the reasoning in the recent unanimous opinion of the Supreme Court in the case of *Louisville & Nashville R. Co. v. Melton*, 218 U. S. 36, 30 Sup. Ct. Rep. 676.

In the opinion written by Mr. Justice White in this case it was said: "That the Fourteenth Amendment was not intended to and does not strip the States of the power to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled — as we shall hereafter take occasion to show — as the essential result of the elementary doctrine that the equal protection of the law clause does

not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition.

"It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the Fourteenth Amendment, because it subjects railroad employees to a different rule as to the doctrine of fellow-servant from that which prevails as to other employments in the State. *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136; *Pittsburg, C. C. & St. L. Ry. Co. v. Ross*, 212 U. S. 560, 29 Sup. Ct. Rep. 688. But while conceding this, the argument is that classification of railroad employees for the purpose of the doctrine of fellow-servant can only consistently with equality and uniformity embrace such employees when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from co-employees not subject to like hazards or

employees engaged in other occupations. The argument is thus stated: 'Plaintiff in error does not question the right of the legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employees incident to railroad hazards, but it does insist that to make this a constitutional exercise of legislative power the liability of the railroads must be made to depend upon the character of the employment and not upon the character of the employer.' Thus stated, the argument tends to confuse the question for decision, since there is no contention that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is, that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employees is justified, yet as in operating railroads some employees are subject to risks peculiar to such operation and others to risks which, however serious they may be, are not in the proper sense risks arising from the fact that the employees are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employees collectively considered, but

must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis the contention comes to this, that by the operation of the equal protection clause of the Fourteenth Amendment the States are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be, but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the Fourteenth Amendment has a scope and effect upon the lawful authority of the States contrary to the doctrine maintained by this court without deviation. This follows since the necessary consequence of the argument is to virtually challenge the legislative power to classify and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however

completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a State to classify will make the error of the contention apparent.

"In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, while declaring that the power of a State to distinguish, select, and classify objects of legislation was of course not without limitation, it was said, 'necessarily this power must have a wide range of discretion.' After referring to various decisions of this court, it was observed:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

"Again, considering the subject in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. Rep. 281, it was reiterated that the legislature of a State has necessarily a wide range of discretion in distinguishing, selecting, and classifying, and it was declared that it was sufficient to satisfy the

demand of the Constitution if a classification was practical and not palpably arbitrary.

"In *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. Rep. 159, a statute of Minnesota, providing that the liability of railroad companies for damages to employees should not be diminished by reason of accident occurring through the negligence of fellow-servants, was held not to discriminate against any class of railroads, or to deny the equal protection of the laws because of a proviso which excepted employees engaged in construction of new and unopened railroads. In the course of the opinion the Court said (p. 598):

"‘The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an over-mathematical nicety to the prohibitions of the Fourteenth Amendment.’ These principles were again applied in *Martin v. Pittsburg & L. E. R. Co.*, 203 U. S. 284, 27 Sup. Ct. Rep. 100, and the doctrines were also fully considered and reiterated at this term in *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. Rep. 496.”

**§ 55. LEGISLATION APPLICABLE ONLY TO EMPLOYEES OF RAILROAD COMPANIES IS NOT ARBITRARY.**

In the case of *Mobile, Jackson & Kansas City Ry. Co. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct.

Rep. 136, Mr. Justice Lurton, delivering the opinion of the court, conclusively disposed of the contention that legislation of this general character is objectionable as an unjust classification, and said:

"It is urged that this legislation, applicable only to employees of a railroad company, is arbitrary, and a denial of the equal protection of law, unless it be limited in its effect to employees imperiled by the hazardous business of operating railroad trains or engines, and that the Mississippi Supreme Court had, in prior cases, so defined and construed this legislation. *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 532, 34 So. Rep. 533; *Bradford Construction Co. v. Heflin*, 88 Miss. 314, 42 So. Rep. 174.

"It is now contended that the provision has been construed in the present case as applicable to an employee not subject to any danger or peril peculiar to the operation of railway trains, and that therefore the reason for such special classification fails, and the provision so construed and applied is invalid as a denial of the equal protection of the law.

"This contention, shortly stated, comes to this: that although a classification of railway employees may be justified from general considerations based upon the hazardous character of the occupation, such classification becomes arbitrary and a denial

of the equal protection of the law the moment they are found to embrace employees not exposed to hazards peculiar to railway operation.

"But this court has never so construed the limitation imposed by the Fourteenth Amendment upon the power of the State to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy because it may happen that the classification includes persons not subject to a uniform degree of danger. The insistence, therefore, that legislation in respect of railway employees generally is repugnant to the clause of the Constitution guaranteeing the equal protection of the law merely because it is not limited to those engaged in the actual operation of trains is without merit.

"The intestate of the defendant in error was not engaged in the actual operation of trains. But he was nevertheless engaged in a service which subjected him to dangers from the operation of trains, and brought him plainly within the general legislative purpose. The case in hand illustrates the fact that such employees, though not directly engaged in the management of trains, are nevertheless within the general line of hazard inherent in the railway business. The deceased was the foreman of a section crew. His business was to keep the track in repair. He stood by the

side of the track to let a train pass by; a derailment occurred and a car fell upon him and crushed out his life.

"In the late case of *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 30 Sup. Ct. Rep. 676, an Indiana fellow-servant act was held applicable to a member of a railway construction crew who was injured while engaged in the construction of a coal tipple alongside of the railway track. This whole matter of classification was there considered. Nothing more need be said upon the subject, for the case upon this point is fully covered by the decision referred to."

In other cases the Supreme Court has affirmed the constitutional validity of statutes of States, which confined to railroads a remedy for injuries otherwise open to the "common employment" defense. The classification of railroads was held to be reasonable and not arbitrary. *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136; *St. Louis, M. B. T. Ry. Co. v. Callahan*, 194 U. S. 628, 24 Sup. Ct. Rep. 857; *Chicago, Kansas & Western R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. Rep. 585; and *Peirce v. Van Dusen*, 78 Fed. Rep. 693.

Mr. Justice McKenna delivering the opinion of the court in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, said:

"The clause of the Fourteenth Amendment especially invoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 6 Sup. Ct. Rep. 57. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. Rep. 350. Similar citations could be multiplied. But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the dis-

cretion and wisdom of the State a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County v. Kimball*, 102 U. S. 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal, and oppressive State legislation. And he observed in another case, 'It is hardly necessary to say that hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity.' . . .

"And in matters not of taxation, if A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B, *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161; to a different measure of damages than B, *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 207, and it permits special legislation in all of its varieties. *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. Rep. 1176; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. Rep. 570. In other words, the State may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion. . . .

"And Mr. Justice Brewer, in *Gulf, Colorado & S. F. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep.

255, after a careful consideration of many cases, said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection.'

Limited in its application to the servants of an interstate railroad while such railroad and the injured servant are engaged in interstate commerce, the language of the Supreme Court of North Carolina in its consideration of a statute of that State is clearly applicable here. In *Nicholson v. Transylvania R. Co.*, 138 N. C. 516, 51 S. E. Rep. 40, the Court said that "the intention of the legislature was that the doctrine of the non-liability of the master for injuries to an employee caused by the negligence of a fellow-servant should be abolished as to all employees in railroad service, 'whether (as we have said in *Sigman v. Southern R. Co.*, 135 N. C. 184, 47 S. E. Rep. 421) they are running trains or rendering any other service, we have no disposition to do otherwise than to affirm fully our ruling already made and cited above. But the Act applies only to employees of a 'railroad operating';

not that such employees must be operating the trains, but they must be employees in some department of its work of a railroad which is being operated. Such business is a distinct, well-known business, with many risks peculiar to itself, and all the employees in such business, whether running trains, building or repairing bridges, laying tracks, working in the shops, or doing any other work in the service of an 'operating railroad,' are classified and exempted from the rule which requires employees to assume the risk of all injuries which may be caused by the negligence of a fellow-servant."

#### § 56. THE INCLUSION OF ALL RAILROAD EMPLOYEES IS A REASONABLE CLASSIFICATION.

"Reasonableness" may be predicated of a classification which follows the judicial rule of inclusion of all in a common employment. When it is admitted that railroading is a hazardous occupation to which legislative regulation is applicable, it cannot be asserted that it is "unreasonable" or "arbitrary" to include all within the common employment of railroading as coming within the scope of legislative classification.

The courts probably assumed, as a reason for the defense of common employment, the difficulty of drawing a line between servants in a common employment. May not the same diffi-

culty in defining in precise terms what occupations in railroading are extraneous to the hazards of such occupation, be a "reasonable" basis for their inclusion in a statute intended to remedy the injustice of the common-employment doctrine of the common law?

As all in the common employment are unified by the common-law rule, can it be said to be unreasonable or arbitrary to include them all in a statute intended to relieve from the disability of servants to recover under the common-law rule?

Such a classification as this statute makes, certainly "is not a mere arbitrary selection." It is "based upon some reasonable ground." It is based upon "some difference which bears a just and proper relation to the attempted classification." It cannot be said that the classification adopted in the statute is a "mere excuse for unjust discrimination," when its purpose is to relieve a class from a "discrimination" existing in the common law which the legislature deems "unjust."

As it has been determined that a classification of "railroads" in a remedial statute like the present is open to no constitutional objection, the inclusion in its terms of all railroad employees in the same common employment is not constitutionally objectionable.

It is a general inclusion. It is all-embracing. It divides railroad employees into no class. It

makes no distinction between employees in railroad service. It favors no branch of railroad service. All the servants of railroads are treated alike. The only limitation made is the necessary one that the railroad shall be engaged in interstate commerce, and the remedy is given to all servants of such a railroad who are injured "while engaged" in interstate commerce. This limitation is made because necessary to bring the case within the scope of the federal power. No other limitation, division, or classification of the servants of railroads is made or attempted. In general terms it may be asserted that all such servants who meet with death or injury while engaged in a perilous employment are sufficiently within the scope of its perils to permit their classification together. "If a man is injured or killed in any line of work, it was hazardous in his case." Message of President Roosevelt to Congress, December 8, 1908.

The killed and injured servants are classified together, and no classification or specification of the precise nature of the accident causing the death or injury is necessary. The perilous nature of the general employment of railroading to which their service has constant relation may be a reasonable and sufficient basis for the classification of all who have been killed and injured in such service.

There is no compulsory requirement that train accidents be segregated from shop accidents, or the casualties arising from track work or construction work. Each of these branches of railroad work has its own perils. Congress has the power to reach such of them as have any relation to interstate commerce, and has no power to reach similar accidents in service of other employers not engaged in interstate commerce.

All who have contracts of service with the carrier may be included in legislation which affects an implied term in said contract if the legislature has the power over the subject-matter. If the subject-matter is interstate service, Congress has power to regulate the implied terms of *all* contracts of service.

In the congressional legislation under the commerce clause regulating the issue of passes, *all* employees of carriers have been classed together as an exception to the general rule which makes penal the issue of passes to the public generally.

The classification together of all the employees of a railroad is not an unfamiliar one, and cannot be said to be arbitrary or discriminatory. The same classification may be found in statutes enacted in England upon the same general subject as that upon which Congress has legislated.

The final and conclusive answer to the contention that all the employees of a railroad cannot

be the beneficiaries of remedial legislation is made by the Supreme Court in the case of *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 384, 13 Sup. Ct. Rep. 914, where it was declared that "*All enter into the service of the same master to further his interests in the one enterprise.*"

## CHAPTER XII

### CONGRESS MAY PROVIDE A REMEDY FOR INJURIES CAUSED BY INTRASTATE SERVANTS

**§ 57. THE INJURY FROM A CAUSE WITHIN THE CONTROL OF THE INTERSTATE EMPLOYER CONSTITUTES THE INTERFERENCE WITH INTERSTATE COMMERCE.**

It has been asserted that there is constitutional objection to the Act in that it affords a remedy to an interstate employee who may be injured as the result of negligence of a fellow-servant who is engaged in intrastate commerce. (Report of Committee appointed by Conference of Railroad Counsel at Atlantic City, N. J., July 13, 14, 15, 1908.)

If the casualty resulting to an employee of an interstate railroad, while such employee is himself engaged in interstate commerce, results from a cause over which the interstate employer has authority and control, there does not seem to be much ground for discrimination as to the local or interstate status of such cause.

Congress has said in effect that if the master allows or permits any agency over which he has authority and control to invade the domain of

interstate commerce to the extent of violating the right to safety of his interstate employees, he cannot plead as a defense the fellow-servant doctrine.

The congressional power extends to any servant of an interstate road, while he is about his master's business, and is engaged in interstate commerce, to the extent of protecting him from any injury arising from a cause within his employer's control. The injury to him constitutes an interference with interstate commerce, and Congress has the power to fix the liability of the carrier therefor.

If an act of an intrastate servant is so directly connected with interstate commerce that it injures one who is engaged in interstate commerce, such act is so proximate to interstate commerce as to bring it within the power of Congress. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900.

The acts of the Chicago rioters in the *Debs Case* were in one sense purely local. But the interference with instrumentalities of interstate commerce brought such acts within the scope of the federal power.

Under the application of the doctrine of *respondeat superior*, others than the actual participants in violence were punished under the power of the federal government to protect commerce. Similarly the doctrine of *respondeat*

*superior* may be permitted to apply to an injury to an interstate servant of an interstate railroad from local causes and instrumentalities which are within the control of such interstate carrier.

Even an intrastate servant of an interstate carrier is one of the cogs in a mechanism which as a complete whole is interstate and within federal control.

As Lord Colonsay said in *Wilson v. Merry*, 19 L. T. Rep. n. s. 30; L. R. 1 Scotch App. 326: "We must look to the functions the party discharges and his position in the organism of the force employed, and of which he forms a constituent part."

Such an intrastate servant is *hired* by the interstate carrier, is *paid* by the interstate carrier, his service is *for the benefit of* the interstate carrier. And his service is essentially necessary for the interchange of local and interstate traffic, and is always performed under orders and authority emanating from superior officers of the company, who are themselves interstate employees.

As a matter of fact, there is no distinction as to the employment by carriers of their servants in interstate and intrastate commerce. As already cited from the *Baugh Case*, 149 U. S. 368, 384, 13 Sup. Ct. Rep. 914: "All enter into the service

of the same master, to further his interests in the one enterprise."

#### § 58. THE IMPOSSIBILITY OF SEGREGATING INTRASTATE FROM INTERSTATE EMPLOYEES.

So great is the intermingling of interstate and state traffic in the business of an interstate railroad, that it would be almost, if not absolutely, impossible to name any servant of an interstate road who was solely and exclusively a state servant or agent of that railroad.

An interstate railroad is run as a unit. All the departments and divisions of such railroads are closely correlated and intermingled, and it would be difficult to define a distinct line of segregation. The financial affairs of the road are managed as a whole. The direction and control of trains are under one head. The general orders covering all operations of the road come from the same general manager. Particular orders as to the dispatch of trains originate with interstate train dispatchers. The same engines, cars, and other instrumentalities are indiscriminately used in interstate and intrastate business. The same tracks are used for both interstate and intra-state traffic. The most distinctively local branches have physical connection with the interstate tracks, and foreign cars loaded with interstate traffic, and trains of the road itself containing

cars loaded in whole or in part with interstate traffic, pass indiscriminately over these local divisions.

At the ticket offices of every local branch of such a railroad tickets are sold over the entire interstate railroad, and also over intrastate connecting lines. Inasmuch as interstate passengers are thus solicited and afterwards carried over such seemingly local branches, all engaged in their transportation, and all co-operating in the maintenance of the track for their transportation, are engaged in interstate commerce.

Every local freight station on the line receives and transmits freight for all other stations on the line, and for points beyond the State, and thus all who co-operate in any of the work of the receipt or transmission of such freight are engaged in interstate commerce. All who participate in the maintenance of the instrumentalities for the general use of the road, even in the maintenance of such instrumentalities as are used on purely local branches, necessarily participate in the work of interstate commerce, because interstate commerce is carried on over every part, branch, section, and division of the entire system of such interstate road.

## CHAPTER XIII

## A REVIEW OF THE HOXIE CASE

**§ 59. RELATION OF THIS ACT TO SOVEREIGNTY  
OF STATES.**

The Supreme Court of Errors of Connecticut in the case of *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, declared the Employers' Liability Act of 1908 to be unconstitutional, and in the course of the opinion spoke of the statute as one which "reduces the limits within which sovereignty of the States has for more than a century been freely exercised."

As to commerce, the sovereignty of a State extends only to that commerce which is exclusively internal and within its own limits. No sovereign power of a State ever existed over commerce with other States.

Over interstate commerce federal authority is paramount, and has been ever since the adoption of the Constitution.

This Act confers a right of action not existing under the laws of Connecticut, and not existing at common law, for the benefit of an employee of an interstate railroad, or his dependents if he is injured or killed while engaged in interstate

commerce. It confers a federal right where none existed heretofore.

How does this "reduce the limits of the sovereignty of the States?" No right existing by the laws of the States is reduced, impaired, or qualified.

No right of any servant of an exclusively local railroad is in any manner affected or impaired by this statute. No limitation is made or attempted by the Act upon the enforcement of a right of action of a local servant of a local railroad. By its terms there is no impairment of any statutory or judicial rule applicable to actions of which the State has sole jurisdiction.

No limitation of the sovereignty of the States exists because a federal right, now conferred where none heretofore existed, is different in its terms and conditions from the terms and conditions under which actions which *are* authorized under local law are heard and determined in local courts.

No change in local actions under local laws is made or is sought to be made.

No limitation can be predicated of state authority when all actions constitutionally authorized by the statutes of a State, or arising exclusively in such commerce as is within the sole jurisdiction of the State, remain unaffected and uncontrolled by the terms of the federal statutes.

No obligation exists to compel Congress in the establishment of a new federal right to confer it in terms which shall be uniform with the terms and conditions under which somewhat similar rights are enforced in the courts of the States.

Such compulsion of uniformity would render futile any attempt by Congress to legislate upon any subject where state legislation existed upon subjects more or less remotely related to the subject-matter of proposed federal legislation.

When no right within the scope of Constitutional exercise of state power is impaired or affected, the establishment by Congress of a federal right in the exercise of its constitutional powers cannot properly be said to "limit the sovereignty of the States."

There is and can be no "conflict" and no limitation of state sovereignty, where the national Congress creates a new right of action under circumstances where the common law and the law of a "State" denied such a right of action.

The terms and conditions of such a federal cause of action have no relation to the terms and conditions under which causes of action under substantially different circumstances exist under the undoubted power and authority of the State.

Where, as disclosed in the Connecticut case, a State right to recover from an employer for the negligence of a fellow-employee is non-existent,

how can the creation of a federal right under such circumstances limit the sovereignty of the States or conflict with their procedure? As no right of action exists under the circumstances in Connecticut, it is extremely difficult to understand why, as the court in the *Hoxie Case* says, the proceeding authorized by the federal law "could only be sustained by disregarding many of the requirements of our own law [that of Connecticut] with respect to both pleadings and evidence."

As before stated, the federal law establishes no rule of pleading or evidence. No more difficulty exists in the enforcement of such a cause of action as Congress has here established in the courts of a State than in the courts of the United States. The procedure in both is identical. The recognition of such a right in either the courts of a State or in the courts of the United States in no manner limits the sovereignty or impairs the authority of the State.

The past inaction of Congress on a particular subject within its express powers affords no aid to an argument against its authority upon such subject.

"Surely there is no statute of limitations which bars Congress from the exercise of any of its granted powers, nor any authority, save that of the people whom it represents, which may with

propriety challenge the wisdom of its choice of the time when remedies shall first be applied to what it deems wrong." Mr. Justice Moody, dissenting opinion *Employers' Liability Cases*, 207 U. S. 522.

The court in the *Hoxie Case* refers to the Act in question as "an Act of Congress which, if valid, reduces the limits within which the sovereignty of the State has for more than a century been freely exercised." But if the Act in question is a regulation of commerce, the fact that it invades the reserved powers of the State, or the sovereignty exercised under the police power of the State for more than a century, does not in any degree affect or limit the power of Congress.

That legislative power over a subject-matter is within the reserved powers of the States or within the police power of the State does not impair the paramount right of Congress to act upon that subject-matter in the execution of any of the powers delegated to Congress by the Constitution of the United States. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 211.

#### § 60. No ACTION UNDER TWO THOUSAND DOLLARS.

In the course of the opinion in the *Hoxie Case* the Court says: "It is true that under the present statutes of the United States no action under the

Act of 1908 would lie in a court of the United States unless the damages claimed exceeded \$2,000. Congress may, however, well be deemed to have had in mind the power of the plaintiff to claim what damages he pleases, and the rule that the sum named determines the jurisdiction."

To claim that Congress intended either that no right of action should lie in any court for a case legitimately involving less than \$2,000, or that plaintiff should claim excessive damages, to bring himself within the jurisdiction of a Circuit Court of the United States, is tantamount to the assertion that Congress did not intend that actions under the Act of 1908 should be brought in state courts. But the fact that no action for damages under \$2,000 would lie in any court if confined under the statute to the United States Circuit Courts, would seem to negative the suggestion that Congress intended to bar such actions, and to indicate the congressional intent that they should be brought in the state courts.

In 1 Foster's Federal Practice, 90, the rule is plainly laid down and fortified by ample authority that, "Where the plaintiff exaggerates the amount in dispute the court may, on exception properly taken, try the question of jurisdiction separately without a jury, and if the damages appear to have been purposely and fraudulently magnified, it may dismiss the case. . . ."

Among the cases cited in support of this proposition are the following: *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 23 Sup. Ct. Rep. 754; *Chicago Cheese Co. v. Fogg*, 53 Fed. Rep. 72; *Simon v. House*, 46 Fed. Rep. 317; *Holden v. Utah & M. Mach. Co.*, 82 Fed. Rep. 209; *Horst v. Merkley*, 59 Fed. Rep. 502; *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 Fed. Rep. 286; *Bedford Quarries Co. v. Welch*, 100 Fed. Rep. 513; *Bank of Arapahoe v. David Bradley Co.*, 72 Fed. Rep. 867.

In contrast with the suggestion of an exaggeration of a plaintiff's claim as a basis for the jurisdiction of the United States Circuit Court in cases involving under \$2,000, may be noted the case of *Smeltzer v. St. Louis & S. F. R. Co.*, 168 Fed. Rep. 420, in which the Court, referring to this same statute, said: ". . . suits for \$2,000 and less must be brought in the state courts, otherwise jurisdiction obtains in no court, state or federal, for that class of cases, and the Act of Congress, to that extent, is unenforceable. Any other conclusion would not only nullify the twentieth section of the Hepburn Act under consideration, but many other Acts of deep concern to the country, among others Act May 30, 1908, c. 225, 35 Stat. 476, 'to promote the safety of employees on railroads'; Act April 22, 1908, c. 149, 35 Stat. 65, known as the 'Employers'

Liability Act'; Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the 'Act to prevent cruelty to animals while in transit'; and others which might be cited."

It is provided by the Judiciary Act of March 3, 1875, 18 Stat. 472 (U. S. Comp. Stat. 1901, 511): "That if in any suit commenced in a Circuit Court . . . it shall appear to the satisfaction of said Circuit Court . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, . . . the said Circuit Court shall proceed no further therein, but shall dismiss the suit. . . ."

This ruling in the *Hoxie Case*, if sustained, would leave any citizen with a federal right to recover an amount under \$2,000 without a remedy in any court in the land, except in the Territories and District of Columbia. Assignees in bankruptcy, national banks, and all who base a right upon a federal law, to recover a sum less than \$2,000, would find no court in the land open to them, if this rule enunciated by the Connecticut court were to be generally applied.

But it is said the application is made only to a "new cause of action" created by Congress. Yet there was a time when each of such now

well-established causes of action was new, and it was never thought proper to bar them from state courts.

**§ 61. ACTION BY PERSONAL REPRESENTATIVE AND DISTRIBUTION OF FUND.**

In the course of the opinion in the *Hoxie Case* it was said: "The Act gives a remedy for injuries causing death, without limitation of the damages recoverable, in favor of the executor or administrator; the fund to be distributed in a manner which is inconsistent with the law of every State with respect to the devolution of the estate of a deceased person. In our opinion Congress cannot create such a right of action in favor of personal representatives of an inhabitant of a State. They are appointed, or their appointment is approved, by authority of the State, exercised through some court to which they are accountable. If the damages recoverable are to be treated as representing estate left by the decedent, it is for the State of his domicile to regulate their distribution. If they are to be treated as a fund created by this Act, which does not represent anything that ever belonged to the decedent, it was, in our opinion, not within the competency of Congress thus to bring into existence a new duty of executors or administrators to collect and a new duty of masters to pay what the decedent never owned. Such

legislation falls solely within the sphere of the States."

In *United States v. Hall*, 98 U. S. 343, objections similar to those which the court here urges were raised to the constitutionality of an act of Congress providing punishment for "every guardian . . . who embezzles or fraudulently converts the pension of his ward."

The defendant contended in that case that such a law was unconstitutional on the following grounds:

"a. That it is municipal in its character, operating on the conduct of individuals, and that it assumes to take the place of ordinary state legislation.

"b. That if Congress may pass such a law, then Congress may assume all the police regulations of the States and work their entire destruction.

"c. That inasmuch as the state law authorized the guardian to receive the pension money, the defendant cannot be subjected to an indictment under an Act of Congress for embezzling it after he lawfully received it.

"d. That matters of police regulation are not surrendered to Congress, but are exclusively within state legislation.

"e. That a guardian is a state officer, and as such is not subject to the laws of Congress in the performance of his duties."

But the Supreme Court, Mr. Justice Clifford delivering the opinion, said: "It is competent for Congress to enforce by suitable penalties *all legislation necessary or proper to the execution of power with which it is intrusted.* . . . "

To be sure, the provision referred to in the *Hall Case* just cited referred specifically to the distribution of the nation's own bounty, and arose from the power under the Constitution to raise armies and declare war. But the federal legislative power is not to be measured differently when in exercise of the war power than when it arises under the commerce clause.

The legislative power may provide for the protection of beneficiaries when a fund arises under a federal right as fully as when it arises from a federal appropriation.

It is also to be noted that the court in the *Hall Case* said that "The word 'guardian,' as used in the Act of Congress, is merely the designation of the person to whom the money granted may be paid for the use and benefit of the pensioners."

A similar interpretation may be given to the words "personal representatives" in the Act now under consideration. Indeed this is the construction given under the Workmen's Compensation Act in England. "If there is to be an executor or administrator, the whole sum awarded must be paid to him. *He does not, however, receive it*

*as personal representative* of the deceased workman, nor is it part of the workman's estate, or liable for his debts. *He holds it as a trustee under the statute.*" (Note to 1 Minton-Senhouse's Workmen's Compensation Cases, page 149.)

As the fund is no part of the estate of the deceased workman, but is a fund which arises solely from the federal law, there is no applicability of state laws as to the devolution of such estate.

When Congress has acted upon a matter within the scope of its power, all state legislation which in any manner conflicts with it must give way. It is inconceivable that the power of Congress to create a fund for the benefit of the widows and orphans of railroad employees, and to determine the beneficiaries of this fund, or to make the personal representative a trustee for its distribution in the manner set forth in the statute, is in any manner impaired or affected by the laws of a state governing the distribution of the estate of the deceased.

As held by the Supreme Court of the United States in *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. Rep. 802: "When a state statute and a federal statute operate upon the same subject-matter, and prescribe different rules concerning it, *the state statute must give way.*"

But here there is no real conflict. The estate of deceased is administered according to state law.

The fund arising from the federal statute is distributed in accordance with the terms of that statute. If in order to sustain the constitutionality of the Act, it were necessary to give to the term "personal representative" a significance other than its strictly technical meaning as executor or administrator, such meaning might be given to it without violence to the terms. For a case where in an act of Congress the term "personal representatives" was interpreted to mean "heirs," see *Emerson v. Hall*, 13 Peters, 409. Although this also was a case of the granting of a gratuity or a donation by the Government itself upon grounds of public policy within its admitted powers, there does not seem to be much doubt that the same rule would be applicable where a new federal right is created upon grounds of public policy, and that such federal right is wholly within the regulation of Congress as to its terms and conditions, and as to the class who shall be beneficiaries.

The subject-matter being within its regulative power, legislative authority as to all details exists in Congress without limitations other than those existing in the Constitution, and under such circumstances its discretion as to the public policy involved is unlimited and uncontrolled by the laws or policy of the States.

**§ 62. RAILROAD HELD TO LIABILITY OF INSURER.**

The opinion in the *Hoxie Case* suggests as objections to the constitutionality of the Act a number of hypothetical cases illustrative of possible applications of the statute. A review of these illustrations will not now be made, but it is believed that they have been fully answered in the discussion of "the Causal Relation between Employment and Injury" on page 96, *ante*.

Another objection raised by the court in the *Hoxie Case* is stated as follows: "It serves to confirm this conclusion [that the Act is unconstitutional] that the liability thrown upon the carrier by section 1 is not confined to damages resulting solely from the negligence of its officers, agents, or employees. It is fixed and complete if such negligence contribute in any degree to the injury, although it be partly due to the act or omission of a mere stranger. There can be no contribution between wrongdoers. If, therefore, the carrier in such case could be held under the statute, his property would be taken to pay for wrong, mainly, perhaps, done by one with whom it stood in no contractual relations, and who, except for this particular Act, had no connection with commerce between the States."

This objection is based upon the doctrine that there can be no contribution between wrongdoers.

But "wrongdoer" in the sense in which it is used in the rule of law quoted by the court means one who is guilty of an act *malum in se*. This rule has no application to the ordinary questions of negligence. The rule has been well stated to be that "where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." Smith, Master and Servant, 5th ed., 195, citing *Lowell v. Boston & Lowell Railroad Corporation*, 23 Pickering 33.

Railroad accidents seldom occur as the result of an act *malum in se*.

They are rarely the result of an intentional wrongful act. They are almost without exception the result of some unintentional disregard of orders resulting from forgetfulness, or by some lapse of care for which the law has no higher characterization than "negligence." It is almost impossible to conceive of an accident to a railroad man in which it would be possible to charge his employer with culpable moral wrong within the meaning of the term *malum in se*.

In any case not involving such moral wrong the right of contribution is left to the employer to enable him to recover from any third party whose act or negligence aided in producing the injury

for which he is held to be primarily liable in an action brought under the Act.

A statute of Nebraska open to all the objections as to a passenger which the Connecticut court here urges as to an employee, namely, that the railroad could be held to liability as an insurer for injury resulting where it was in no degree proved to be in fault, was expressly upheld by the Supreme Court of the United States in the case of *Chicago, R. I & P. Ry. Co. v. Zernecke*, 183 U. S. 582, 22 Sup. Ct. Rep. 229.

#### § 63. JURISDICTION OF STATE COURTS.

In the course of the opinion in the *Hoxie Case* it was said: "If it be assumed that Congress has power to prescribe a different rule for accidents occurring in or outside of Connecticut in the course of running a railroad train between States, and to create a new statutory action for its enforcement cognizable by the courts of the United States, it can not, in our opinion, require such an action to be entertained by the courts of this State."

From the foundation of the government up to the present time it has, by the universal practice of all courts, been considered without very serious question that federal statutes are enforceable in state courts, both as a cause of action for a plaintiff and as a matter of substantive defense for a party sued in such courts.

Chancellor Kent, in his Commentaries (1 Kent's Com. 400), says: "In judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter."

Pomeroy, "Introduction to the Constitutional Law of the United States," 9th ed., page 621, § 743, says: "Strip the national government of an authority to apply a sanction commensurate with its power to legislate, and just so far we subtract from that legislation the necessary element of a command. Strip the government of the ability to make that sanction supreme, and we equally invalidate the authority of the legislative utterance. This attribute of supremacy would be destroyed by permitting the state courts, for example, to decide upon the effect of national laws, and by making their decisions, in the particular State where made, of an equal authority with those pronounced upon the same subject by the national judges. This difficulty thus to be apprehended from the action of state tribunals could only be prevented in one of two ways: either

by removing from them the power to decide at all upon rights and duties which spring from the national legislation, and conferring the function exclusively upon the United States courts; or by permitting the state judiciary to exercise a jurisdiction in such cases, but making that jurisdiction subordinate to the authority of the national courts, and rendering the local decisions reviewable by the United States judges, who could in this manner enforce their attribute of supremacy in relation to the matters under consideration. In theory the former of these plans would have been the more simple and perfect. But it was perhaps best, from some motives of expediency, that the Constitution should not expressly determine between these two methods, but should clothe Congress with the power of making such a choice of the alternatives as should be found to promote the convenience of the people. Congress possesses such an authority; it might make all this jurisdiction exclusive in the national courts, but has done so only in particular cases; it might suffer the state tribunals to exercise a complete concurrent power, subject to an equally complete liability to review, but has done so only to a limited extent. Whether Congress shall adopt one or the other alternative is a mere question of policy; it may do either."

The Supreme Court of the United States decided

in the case of *Teal v. Felton*, 12 Howard 284, that a state court had jurisdiction to try an action brought against a postmaster who refused to deliver a newspaper on which there was "an initial," unless the addressee would pay letter postage, the action being founded on sections 13 and 30 of the Act of Congress passed in 1825, forbidding a writing or memorandum on a newspaper or other printed matter, pamphlet, or magazine transmitted by mail. The Court said, page 292, Mr. Justice Wayne delivering the opinion: "But it is said that the courts of New York had not jurisdiction to try the case. The objection may be better answered by reference to the laws of the United States in respect to the services to be rendered in the transmission of letters and newspapers by mail, and by the Constitution of the United States, than it can by any general reasoning upon the concurrent civil jurisdiction of the courts of the United States and the courts of the States, or concerning the exclusive jurisdiction given by the Constitution to the former.

"The United States undertakes, at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be prepaid by the sender, or be paid when either reach their destination by the person to whom they are addressed. When tendered by the latter or by his agent, he has the right to the immediate

possession of them, though he has not had before the actual possession. If then they be wrongfully withheld for the charge of unlawful postage, it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court. Now, the courts of New York having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the Constitution of the United States. That such is not the case we cannot express our view better than Mr. Justice Wright has done in his opinion in this case in the Court of Appeals. After citing the second section of the third article of the Constitution he adds: 'This is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary.' We will add, that the legislation of Congress, immediately after the Constitution was carried into operation, confirms the conclusion of

the learned judge. We find in the 25th section of the Judiciary Act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the States and of the United States was contemplated, for its first provision is for a review of cases adjudicated in the former, 'where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity.'

In the case of *The Moses Taylor*, 4 Wall. 411, 429, the Court said: "The Judiciary Act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the state courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed, from their commencement, exclusively under the cognizance of the federal courts. On the other

hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a federal or a state court, at the option of the plaintiff; and if brought in the state court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the federal courts. Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error, after final judgment. By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the Judiciary Act could only come under the cognizance of the federal courts after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant. The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both state and federal courts."

It is difficult to understand why the Connecticut court cites the case of *Claflin v. Houseman*, 93 U. S. 130, 136, as authority for its position in the *Hoxie Case*, for a careful consideration of the opinion of Mr. Justice Bradley in the *Claflin*

*Case* shows conclusively that the opinion affords no basis for the contention that the state court is not authorized and required to enforce federal statutes. In this opinion Mr. Justice Bradley said: "The general question whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the Constitution, laws, and treaties of the United States has been elaborately discussed both on the bench and in published treatises, sometimes with a leaning in one direction and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.

"When we consider the structure and true relations of the federal and state governments there is really no just foundation for excluding the state courts from all such jurisdiction.

"The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the state laws are.

"The United States is not a foreign sovereignty, as regards the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct

sovereignties, having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under state laws may be prosecuted in the state courts, and also, if the parties reside in different States, in the federal courts.

"So rights, whether legal or equitable, acquired under the laws of the United States may be prosecuted in the United States courts, or in the state courts competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction.

"See remarks of Mr. Justice Field in *The Moses Taylor*, 4 Wall. 429, and Story, J., in *Martin v. Hunter Lessee*, 1 Wheat. 334, and Mr. Justice Swayne in *Ex parte McNeil*, 13 Wall. 236.

"This jurisdiction is sometimes exclusive by express enactment and sometimes by implication.

"If an Act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be

enforced, if not provided otherwise by some Act of Congress, by a proper action in a state court.

"The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

"The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments.

"It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

"It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in the case of *Ableman v. Booth*, 21 How. 506, and hence state courts have no power to revise the action of the federal courts,

nor the federal the state, except where the federal Constitution or laws are involved. But this is no reason why state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

In *Ex parte Siebold*, 100 U. S. 371, the Court said: "The power of Congress, as we have seen, is paramount, and may be exercised at any time and to any extent which it deems expedient; and so far as it is exercised and no further the regulations effected supersede those of the State which are inconsistent therewith.

"As a general rule, it is no doubt expedient and wise that the operations of the state and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself.

"We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity.

"There are very few subjects, it is true, in which

our system of government, complicated as it is, requires or gives room for conjoint action between the state and national sovereignties. Generally the powers given by the Constitution to the government of the United States are given over distinct branches of sovereignty from which the state governments, either expressly or by necessary implication, are excluded.

"But in this case expressly, and in some others by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated; that of the State, however, being subordinate to that of the United States, whereby all question of precedence is eliminated."

If a federal right cannot be the basis of a plaintiff's claim in a state court; if those courts derive their power and authority and compensation from the States for the purpose of deciding only controversies arising under the law of the State, written and unwritten,—then a defense based upon a federal right would be equally unenforceable in said courts. If they refuse to try federal questions for a plaintiff because they are without jurisdiction, how can they consent to try a federal question when asserted as a ground of defense by the party proceeded against?

The frequent exercise of the power of removal to the federal court, from 1789 down to the present day, of cases from the state courts to the federal

courts, because such cases involve federal questions, clearly indicates that the parties to such causes in the state courts before whom such cases were pending all considered that such actions were not demurrable because based on a federal right; that the fact that the federal right was involved was not a defense, but merely a cause for removal. If, in those cases where defendants have secured the removal of causes pending in State courts involving a federal right, they had an absolute defense upon the ground that the State court was not required to try the federal question, it is remarkable that such claim was not asserted as a defense, but was merely used as a basis for removal under a federal statute.

If a state court may decline jurisdiction of a case involving a federal right, it may, by a parity of reasoning, decline to hear a case arising under the laws of a sister State, yet the comity between States has always recognized the rights of a party when the parties to the cause were otherwise within the jurisdiction of a state court, to base his right to recover under the laws of a sister State or of a foreign nation. Connecticut now refuses comity to the federal power which would be and is usually and without cavil extended to foreign powers. If it were a mere matter of comity, the States, in deference to the practice in the federal courts, whenever consistent, to entertain juris-

diction of matters arising under state statutes, should recognize and enforce in their respective courts, whenever consistent, matters and rights accruing under the federal law.

"The Constitution and the laws of Congress passed in pursuance thereof are the supreme law of the land." But it would not be supreme if any right given by it could be overridden, either by state enactment or by judicial decision.

In *Higgins v. Central New England and W. R. Co.*, 155 Mass. 176, 180, the Supreme Judicial Court of Massachusetts, after referring to transitory causes of action which did not exist at common law, but which were created by the statute of another State, and passed to the administrator of the deceased, said: "When an action is brought upon it here the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other States shall be heard here. These principles require that, in case of other than penal actions, the foreign law, if not contrary to our public policy or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of

trials, we can do substantial justice between the parties."

This is the rule of comity usually recognized in the application of foreign law, but the federal power is in no sense foreign to the States.

As was said by the Supreme Court of the United States in the case of *Defiance Water Company v. Defiance*, 191 U. S. 184, 24 Sup. Ct. Rep. 63, "Moreover, the state courts are perfectly competent to decide federal questions arising before them, and it is their duty to do so," citing *Robb v. Connolly*, 111 U. S. 624, 637, 4 Sup. Ct. Rep. 544; *Missouri Pacific Ry. Co. v. Fitzgerald*, 160 U. S. 556, 583, 16 Sup. Ct. Rep. 389.

As was said by Mr. Justice Shiras, in commenting upon the concurrent jurisdictional power of the state and federal courts, in the case of *Murray v. Chicago & N. W. Ry. Co.*, 62 Fed. Rep. 24; "A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of interstate commerce, the argument being that, as the State cannot legislate touching interstate commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the nation and of the several

States do not necessarily apply to the judicial branches of the national and state governments. The legislature of a State cannot abrogate or modify any of the provisions of the federal Constitution nor of the Acts of Congress touching matters within congressional control, but the courts of the State, in the absence of a prohibitory provision in the federal Constitution or Acts of Congress, have full jurisdiction over cases arising under the Constitution and laws of the United States. The courts of the States are constantly called upon to hear and decide cases arising under the federal Constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the law of the State, when the adverse parties are citizens of different States. The duty of the courts is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of federal origin, the legislature of a State cannot abrogate or change it, but the courts of the State may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond state legislative control, does not, *ipso facto*, prevent the courts of the State from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court in which it was originally brought, that court would have

had jurisdiction to hear and determine the issues between the parties, because Congress has not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete."

In the case of *Brown v. Walker*, 161 U. S. 591, 606, 16 Sup. Ct. Rep. 644, Mr. Justice Brown, delivering the opinion of the majority of the court, said: "There is no such restriction, however, upon the applicability of federal statutes. The Sixth Article of the Constitution declares that 'This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.'

"The language of this article is so direct and explicit, that but few cases have arisen where this court has been called upon to interpret it, or to determine its applicability to state courts. But, in the case of *Stewart v. Kahn*, 11 Wall. 493, 505, the question arose whether a debt contracted by a citizen of New Orleans, prior to the breaking out of the Rebellion, was subject in a state court to the statute of limitations passed by Congress June

11, 1864, declaring that as to actions which should accrue during the existence of the Rebellion, against persons who could not be served with process by reason of the war, the time when such persons were beyond the reach of judicial process should not be taken or deemed to be any part of the time limited by law for the commencement of such actions. The court held unanimously that the debt was subject to this Act, and in delivering the opinion of the court Mr. Justice Swayne said: 'But it has been insisted that the Act of 1864 was intended to be administered only in the federal courts, and that it has no application to cases pending in the courts of the State. The language is general. There is nothing in it which requires or will warrant so narrow a construction. It lays down a rule as to the subject, and has no reference to the tribunals by which it is to be applied. A different interpretation would defeat, to a large extent, the object of its enactment. . . . The judicial anomaly would be presented of one rule of property in the federal courts, and another and a different one in the courts of the States, and debts could be recovered in the former which would be barred in the latter.' This case was affirmed in *United States v. Wiley*, 11 Wall. 508; and in *Mayfield v. Richards*, 115 U. S. 137, 5 Sup. Ct. Rep. 1187. See also *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. Rep. 170, 312. The same principle has

also been applied in a number of cases turning upon the effect to be given to treaties in actions arising in the state courts. *Foster v. Neilson*, 2 Pet. 253; *The Cherokee Tobacco*, 11 Wall. 616; *The Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. Rep. 247. . . .

"The Act in question contains no suggestion that it is to be applied only to the federal courts. It declares broadly that 'no person shall be excused from attending and testifying . . . before the Interstate Commerce Commission . . . on the ground . . . that the testimony . . . required of him may tend to criminate him, etc. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, etc.' It is not that he shall not be prosecuted for or on account of any crime concerning which he may testify, which might possibly be urged to apply only to crimes under the federal law and not to crimes, such as the passing of counterfeit money, etc., which are also cognizable under state laws; but the immunity extends to any transaction, matter, or thing concerning which he may testify which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had."

In the case of *Chesapeake & Ohio Ry. Co. v.*

*American Exchange Bank*, 92 Va. 495, 23 S. E. Rep. 935, an action for damages on account of injury to a shipment of live stock being transported over the defendant's line of road, the Court said: "Shearman and Redfield, in their work on Negligence, say: 'The violation of a statute or ordinance regulating the speed of vehicles, horses, or trains, or requiring special signals or warnings to be given upon their approach, or light to be shown, is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such a regulation, provided he is specially injured thereby. The violation of a statute of the United States may be made the basis of an action of negligence in a state court. . . .'"

"We have no doubt that one of the objects of section 4386 of the Revised Statutes of the United States was to prevent loss to the owners of live stock which would result from its being carried long distances by common carriers without food, water and rest. The plaintiff belongs to the class intended to be protected thereby, and has the right to recover from the defendant the damages which were caused, if any, by its violation of the statute, and, having such right, he could bring his action in the state court."

In the case of *Bradbury v. Chicago, R. I. & P.*

*Ry. Co.*, (Iowa) 128 N. W. Rep. 1, Mr. Justice Ladd, speaking for the court, said: "The matter of jurisdiction is not touched in the Act of Congress, and it is now well settled that state courts may exercise concurrent jurisdiction with the federal courts in all cases arising under the Constitution, laws and treaties of the United States, unless exclusive jurisdiction has been conferred, expressly or by necessary implication, on the federal courts. *Clafin v. Houseman*, 93 U. S. 30; *Raisler v. Oliver*, 97 Ala. 714, 12 So. Rep. 238; *Wilcox v. Luco*, 118 Cal. 642, 45 Pac. Rep. 676, 50 Pac. Rep. 758; *Schuyler Nat'l Bank v. Bollong*, 24 Neb. 827, 40 N. W. Rep. 414; *Bletz v. Columbia Nat'l Bank*, 87 Pa. St. 92; *Brinckerhoff v. Bostwick*, 88 N. Y. 60; *People v. Welch*, 141 N. Y. 273. . . .

"An illustration of the exercise of exclusive jurisdiction by the federal courts will be found in *Copp v. Louisville & N. R. Co.*, 43 La. Ann. 511, 9 So. Rep. 441, where a plea to the jurisdiction of the state court was sustained on the ground that the Act of Congress on which the action for damages was based directed that it be brought in the United States courts. In *Hoxie v. New York, N. H. & H. R. Co.*, the Supreme Court of Errors of Connecticut reached the conclusion that, by fair implication, the Act of Congress excludes jurisdiction of the state courts and in any

event the state court was under no obligation to enforce the rights therein created. The last point appears to have been considered as though involving a question of comity merely, regardless of the convenience and propriety of enforcing all rights and redressing all wrongs within the jurisdiction of the local courts.

"The prevailing rule is that where a cause of action accrues by virtue of the statute of any State, the action may be maintained in any other State if not contrary to the public policy or law of the place where the suit is brought. *Boyce v. Railway*, 63 Iowa 70, 18 N. W. Rep. 673; *Morris v. Railway*, 65 Iowa 727, 23 N. W. Rep. 143. See cases collected in note to *Reeves v. Railway*, 70 L. R. A. 513.

"In such cases the law of the place where the right was acquired or the liability incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought. *Herrick v. Railway*, 31 Minn. 1, 16 N. W. Rep. 413.

"Even where the cause of action arises in a foreign country, suits may be maintained in our courts though jurisdiction can be declined, but this is seldom done unless from fear of inability to do full justice through lack of knowledge of the laws of the place where the cause of action

arose. *Mason v. The Blaireau*, 2 Cranch 240; *Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. Rep. 782; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Cofrode v. Gardner*, 79 Mich. 332, 44 N. W. Rep. 623; *Evey v. Railway*, 81 Fed. Rep. 294. The reasons which induce state courts to exercise jurisdiction of causes of action arising in a foreign country or under legislation of another State should be quite as persuasive in favor of assuming jurisdiction over causes of action arising under the statutes of the United States, with this in addition, that these are the laws of the very people the jurisdiction of whose courts is invoked. See 11 Cyc. 996. If a cause of action has become fixed and a legal liability incurred, the doors of the courts of this State should not be closed to the prosecution of such cause of action, regardless of whether the same may have arisen under the statutes of another State, an Act of Congress, or the laws of a foreign country, unless to enforce it would be contrary to the laws or public policy of the State or complete justice probably could not be done. Unless the Act of Congress should be construed to confer exclusive jurisdiction on the federal courts, or the mode of procedure is such that the state courts cannot safely undertake to enforce the liability defined, there seems no ground for declining to exercise a jurisdiction fully approved by the authorities.

The statute is silent concerning jurisdiction, but it is said that the rules of practice prescribed therein and the direction as to who shall be the beneficiaries thereunder are so inconsistent with the state laws as to indicate the congressional intent that redress may be had in the federal courts alone. In order to dispose of this objection it will be necessary to set out the main provisions of the Act. [Citing full text of §§ 1, 3, 4 and 6 of the Act of 1908. See Appendix, pp. 319, 320 and 321.]

"It is manifest from the mere reading that this Act effects quite as important a change in the trial of such causes in the federal courts as would be possible in the state courts. Thus the federal decisions are harmonious on the proposition that the negligence of complainant which contributes proximately to the injury will defeat the recovery of damages therefor. So, too, in the absence of local statutes, the fellow-servant doctrine and that of assumption of risks have been broadly applied in all federal courts. Hereafter all of these rules are to be modified or eliminated where the injuries are such as contemplated in the above Act. If inconvenience and confusion would result from an attempt to enforce the Acts in the state courts, like consequences will be the outcome of a similar undertaking in the courts of the United States. Let us examine the several sections and ascertain

the alleged inconsistencies which are said to preclude the maintenance of actions based thereon in the state courts. No one, we apprehend, would say that the state courts are not competent to entertain suits by the persons authorized by section 1 to recover damages or to distribute those recovered as specified. Under the statutes of this State the suit is prosecuted in the name of the administrator, where death is alleged to have resulted from wrongful act, and anything recovered distributed as personal property among the heirs. It goes to the surviving spouse and children, if any there are, and if not, to the parents of the deceased, precisely as under the federal statute. In event there are neither spouse and children, nor parents of deceased, the remoter heirs are entitled thereto under the State statute, while under this Act the damages go to the next of kin dependent upon deceased. As the state statute must give way to that of Congress, no inconsistency is involved. All essential is that effect be given to the latter as though the former were not on the statute book. Nor can it be said that this involves an interference by Congress with the distribution of an estate through the probate court of the State. The cause of action was created by Congress in the exercise of its power to regulate commerce among the several States, and it is elementary that in doing so it

might determine who was entitled to maintain the same and for whose benefit. The administrator is not required thereby to institute proceedings; he may do so, and in that event can recover only for the benefit of the person entitled under the Act to the damages. The administrator therein sustains the relation to the beneficiaries like that of trustee to his *cestui que trust*, and it is of little concern whether he shall distribute the damages recovered in pursuance of an order of the court wherein recovered or in the appropriate probate court. Surely no court would permit an administrator, after recovering damages under a statute specifically prescribing who is entitled thereto, to divert the money elsewhere.

"It must be borne in mind that this Act does not relate to the distribution of the personal property of an estate. The cause of action does not belong to the estate of the deceased person, but to certain classes for whose benefit the administrator is authorized to recover damages, and we see no ground for saying this is contrary to our law or its policy. In a few States, notably Connecticut, the fellow-servant doctrine is still applied in cases of injury caused in the use and operation of railways, and it seems to have been thought in the *Hoxie Case* that for a state court to apply that doctrine in causes based on injuries received in intrastate commerce and to proceed in actions

based on the federal statute on the theory that the master is responsible for the acts of the fellow-servant would create confusion, 'setting up in the same tribunal different standards of right and policy and practice.' More than fifty years ago the fellow-servant doctrine was eliminated by the legislature of this State wherever the injury was occasioned by the negligent act of the fellow-servant engaged in the use and operation of a railway, and though that doctrine has been continually applied in all cases involving injuries suffered in other employments, little difficulty has been experienced in discriminating between situations exacting the application of the different rules. Indeed, the situation of employees engaged in the operation of railways ordinarily is such that they can exert little direct or personal influence upon each other in discharging their respective duties, and their opportunities for guarding against the negligent acts of one another are so limited that in many if not in most of the states, laws have been enacted declaring the master liable for the negligent acts of the servant when engaged in the use and operation of railways, even though the injured party be a fellow-servant.

"And we apprehend that the design of Congress was to furnish this measure of protection to employees engaged in interstate commerce in those

States where, for reasons such as are suggested in the *Hoxie Case*, none have been provided by local legislation. Section 4 is somewhat similar to a statute of this State relating to assumption of risks. (Ch. 219 Acts 33rd Gen. Assem.) And the only difficulty in entertaining suits for liability under the Act of Congress, as it seems to us, will develop in the construction and application of section 3. Under the decisions of this State contributory negligence, if the proximate cause, has always been held to defeat recovery. But such has been the rule in the federal courts and, as said, is now, save as modified by this Act. No greater difficulty will confront the state courts in applying this or other sections of the Act than the courts of the United States, and for this reason there is no ground for inferring from the somewhat radical nature of the Act that it was the intent of Congress to confer exclusive jurisdiction on the federal courts. With all due respect for the eminent court holding otherwise in the *Hoxie Case*, we are not persuaded by the reasoning of its opinion. Differences between the federal and local courts no greater than those between different statutes or laws of the same State do not alone justify the conclusion that Congress intended to deny jurisdiction of the state courts nor furnish a satisfactory reason for refusing that comity due to sovereign govern-

ment. Nor does it appear to have convinced the Congress, for an Act approved April 5, 1910, 36 Stat. 291, declared the jurisdiction of the United States courts under this Act concurrent with that of the state courts, and further declared that "no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

For a further discussion of this topic see Senate Report No. 432, 61 Congress, 2 Session, March 22, 1910; *Owens v. Chicago G. W. Ry. Co.*, (Minn.) 128 N. W. Rep. 1011; *St. Louis, I. M. & S. Ry. Co. v. Hesterly*, (Ark.) 135 S. W. Rep. 874, and cases there cited.

#### § 64. JUSTICE AND POLICY OF FELLOW-SERVANT RULE.

The *Hoxie Case* refers to the rule that a servant cannot recover from his master for injuries received from the negligence of a fellow-servant acting in the same line of employment as a "rule of justice" and a "rule of policy," and as "*resting upon considerations of right and justice* that have been generally accepted by the people of the United States."

In the case of *Burke v. Norwich & W. R. Company*, 34 Conn. 474, 479, the Court said: "The principle relied upon by the defendants, that a master is not liable to a servant for an injury to

him occasioned by the misconduct or negligence of a fellow-servant, has been so often recognized both in this country and in England that it must now be considered as settled law. Two reasons are usually assigned for the rule: 1st, That the employed must be supposed to have contracted with reference to the perils of the business, including those which may arise from the character and conduct of his fellow-employees; and 2d, That public policy requires that each servant should be influenced by its operation to be not only careful of his own doings, but as watchful as possible over the acts of his associates. *Farwell v. Boston & Worcester R. Company*, 4 Met. 49.

"The justness of this reasoning has been questioned by high judicial authority. *Little Miami R. Co. v. Stevens*, 20 Ohio 435. However plausible may be the theory, it is very doubtful whether, in fact, a spinner in a factory or a fireman on a railroad ever made an examination into the condition of the machinery, the mode of conducting the business, or the character and habits of the operative, for the purpose of ascertaining the extent of his risk as an element in calculating the proper amount of his wages. A passenger in a railroad car may well be presumed to have a vivid consciousness of his risk, but it has never been understood that he contracts with reference

to it when he buys his ticket, so as to be his own insurer. Again, a principal is responsible to an employee for his own negligence,— why should he not be liable for that of his agent over whom the employee has no control, and of whom he may have no knowledge.

"With respect to considerations of policy, it is by no means certain that the public interests would not be best subserved by holding the superior, with his higher intelligence, his surer means of information, and his power of selecting, directing, and discharging subordinates, to the strictest accountability for their misconduct in his service, whoever may be the sufferer from it."

Among the decisions of the Supreme Court of Errors of Connecticut may be found strong statements criticising the defense of common employment, and completely answering the suggestion in the *Hoxie Case*, that the rule rests upon considerations of justice or policy. In the case of *Zeigler v. Danbury & Norwalk Railroad Company*, 52 Conn. 543, 556, the majority of the court says: "The defense of common employment has little of reason or principle to support it, and the tendency in nearly all jurisdictions is to limit rather than enlarge its range. It must be conceded that it cannot rest on reasons drawn from considerations of justice or of public policy."

## PART III

THE SAFETY APPLIANCE ACTS<sup>1</sup>

## CHAPTER XIV

ABSOLUTE MANDATORY OBLIGATION TO COMPLY  
WITH SAFETY APPLIANCE ACTS**§ 65. LIABILITY OF CARRIERS UNDER ACT IS  
ABSOLUTE.**

The relief of railroad men from the burden of the common-law rules was begun when Senator

<sup>1</sup> The following is a list of actions for death or personal injuries in which the Safety Appliance Act has been applied or construed: *Briggs v. Chicago & N. W. Ry. Co.*, 125 Fed. Rep. 745; *Brinkmeier v. Missouri Pac. Ry. Co.*, 105 Pac. Rep. 221; *Carson v. Southern Ry. Co.*, 46 S. E. Rep. 525; *Chicago Junction Ry. Co. v. King*, 169 Fed. Rep. 372; *Chicago, M. & St. P. Ry. Co. v. Voelker*, 129 Fed. Rep. 522; *Cleveland, C. C. & St. L. Ry. Co. v. Baker*, 91 Fed. Rep. 224; *Coleman, State ex rel. v. Kelly*, 70 L. R. A. 450; *Coley v. North Carolina R. Co.*, 128 N. C. 534, 39 S. E. Rep. 43; *Crawford v. New York C. & H. R. R. Co.*, 10 Am. Neg. Rep. 166; *Dawson v. Chicago, R. I. & P. Ry. Co.*, 114 Fed. Rep. 870; *Denver & R. G. R. Co. v. Arrighi*, 129 Fed. Rep. 347; *Denver & R. G. R. Co. v. Gannon*, 90 Pac. Rep. 853; *Devine v. Illinois Central R. Co.*, 156 Ill. App. 309; *Donegan v. Baltimore & N. Y. Ry. Co.*, 165 Fed. Rep. 869; *Elmore v. Seaboard Air Line Ry. Co.*, 41 S. E. Rep. 786; *Erie R. Co. v. Russell*, 183 Fed. Rep. 722; *Gilbert v. Burlington, C. R. & N. Ry. Co.*, 128 Fed. Rep. 529; *Greenlee v. Southern Ry. Co.*, 30 S. E. Rep. 115; *Harden v. No.*

White of Louisiana, now Chief Justice of the United States, offered in the Senate an amend-

*Carolina R. Co.*, 40 S. E. Rep. 184; *Hohenleitner v. Southern Pacific Co.*, 177 Fed. Rep. 796; *International & G. N. Ry. Co. v. Elder*, 99 S. W. Rep. 856; *Johnson v. Great Northern Ry. Co.*, 178 Fed. Rep. 643; *Johnson v. Mammoth Vein Coal Co.*, 114 S. W. Rep. 722; *Johnson v. Southern Pacific Co.*, 196 U. S. 1; *Kansas City M. & B. R. Co. v. Flippo*, 35 Southern Rep. 457; *Kelley v. Great Northern Ry. Co.*, 152 Fed. Rep. 211; *Larabee v. New York, N. H. & H. R. Co.*, 66 N. E. Rep. 1032; *Lewis v. Pennsylvania R. Co.*, 69 Atl. Rep. 821; *Lukens v. Lake Shore & M. S. Ry. Co.*, 154 Ill. App. 550, 248 Ill. 377; *Lyon v. Charleston & W. C. Ry. Co.*, 56 S. E. Rep. 18; *Mallott v. Hood*, 66 N. E. Rep. 247; *Mobile, J. & K. C. R. Co. v. Bromberg*, 37 Southern Rep. 395; *Myrtle v. Nevada C. & O. Ry. Co.*, 137 Fed. Rep. 193; *Nichols v. Chesapeake & O. Ry. Co.*, 105 S. W. Rep. 481; *Norfolk & W. Ry. Co. v. Hazelrigg*, 170 Fed. Rep. 551; *Philadelphia & R. Ry. Co. v. Winkler*, 56 Atl. Rep. 112; *Plummer v. Northern Pacific Ry. Co.*, 152 Fed. Rep. 206; *Rio Grande Southern R. Co. v. Campbell*, 96 Pac. Rep. 986; *Roeney v. Erie R. Co.*, 135 Fed. Rep. 311; *St. Louis, I. M. & S. Ry. Co. v. Neal*, 98 S. W. Rep. 958; *St. Louis Cordage Co. v. Miller*, 126 Fed. Rep. 495; *St. Louis & S. F. R. Co. v. Delk*, 158 Fed. Rep. 931; *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281; *St. Louis, I. M. & S. Ry. Co. v. York*, 123 S. W. Rep. 376; *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 205 U. S. 1; *Shohoney v. Quincy, O. & K. C. Ry. Co.*, 122 S. W. Rep. 1025; *Siegel v. New York C. & H. R. R. Co.*, 178 Fed. Rep. 873; *Snead v. Central of Ga. Ry. Co.*, 151 Fed. Rep. 608; *Southern Pacific Co. v. Allen*, 106 S. W. Rep. 441; *Southern Ry. Co. v. Carson*, 194 U. S. 136; *Southern Ry. Co. v. Simmons*, 55 S. E. Rep. 459; *Sprague v. Wisconsin Central Ry. Co.*, 116 N. W. Rep. 104; *Suttle v. Choctaw, O. & G. R. Co.*, 144 Fed. Rep. 668; *Taggart v. Republic Iron & S. Co.*, 141 Fed. Rep. 910; *Texas & Pacific Ry. Co. v. Swearingen*, 122 Fed. Rep. 193; *Toledo, St. L. & W. R. Co. v. Gordon*, 177 Fed. Rep. 152; *Troxler v. Southern Ry. Co.*, 32 S. E. Rep. 550; *Union Pacific R. Co. v. Brady*, 161 Fed. Rep. 719; *Voelker v. Chicago, M. & St. P. Ry. Co.*, 116 Fed. Rep. 867; *York v. St. Louis, I.*

ment which became a part of the original Safety Appliance Law. This amendment provided that an employee injured by any locomotive, car, or train in use contrary to the provisions of the Act "shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge." This was the first attempt wisely made to relieve from rules which, if they ever had any basis of wisdom or usefulness in their application to modern conditions, had become the instruments of grave injustice to workmen. It was of this aspect of the Act that Mr. Justice Holmes in *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. Rep. 407, said: "Probably the modification of this general principle by some judicial decisions and by statutes like section 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist."

#### The necessity for a construction of the Act

*M. & S. Ry. Co.*, 110 S. W. Rep. 803; *Felt et ux. v. Denver & R. G. R. Co.*, 110 Pacific Rep. 215; *United States v. Western & Atlantic R. Co.*, 184 Fed. Rep. 336; *Norfolk & Western R. Co. v. Hazelrigg*, 184 Fed. Rep. 828; *United States v. Baltimore & Ohio R. Co.*, 184 Fed. Rep. 94; *United States v. Norfolk & Western Ry. Co.*, 184 Fed. Rep. 99; *Chicago, R. I. & P. Ry. Co. v. Brown*, 185 Fed. Rep. 80; *Toledo, St. L. & W. R. Co. v. Sellars*, 184 Fed. Rep. 855.

which will on broad lines carry out the humane purpose of Congress, regardless of any qualifying rules which existed before the adoption of the statute, is clearly and forcibly expressed by Circuit Judge Pritchard in the case of *Atlantic Coast Line Ry. Co. v. United States*, 168 Fed. Rep. 175, 186, where he says: "The contention that this statute works a hardship applies with equal force to any statute which undertakes to control the affairs of individuals or corporations in this way; but in the light of past experience we are inclined to think that this is the only method by which dangers incident to this kind of employment can be minimized. When we contemplate the vast number of accidents resulting from the operation of railroad trains not properly equipped with safety appliances, we are forced to admit the wisdom and fairness of legislation of this kind. It has been the policy of our law-makers, both state and national, to grant railroad and other public corporations certain privileges not enjoyed by private individuals; and while this is a wise policy, and has met with general approval, it is likewise proper that due regard shall be had for the rights of those employed by such corporations in performing duties that are necessarily dangerous in their character, and it cannot be said to be an unreasonable provision to require railroad companies, enjoying privileges thus conferred upon

them, to manage and operate their engines and cars so as to minimize the risks incident to travel and employment.

" . . . any construction short of holding the Act to be absolute would leave undisturbed the situation as it existed prior to its enactment, and it would be difficult to imagine a state of facts upon which railroads would be liable for a penalty or where an employee would be able to recover in an action instituted to recover damages for injuries incurred on account of failure to perform the duties imposed by the statute. . . . The degree of diligence required by the statute is of the highest order, and *the duty thus imposed is absolute and unconditional.*"

In the case of *Brinkmeier v. Missouri Pacific Ry. Co.*, 81 Kan. 101, 105 Pac. Rep. 221, the Court, speaking of the Act, says: "Two views have been taken of this provision by courts that have had occasion to construe it. One view is that Congress intended to require railroad companies to equip their cars with automatic couplers, but that when this had been done a company was to be liable for an injury resulting from the failure of the device to work only in case such failure was due to some negligence on its part according to the ordinary rules. The other view is that the intention was to do away altogether with the common-law rule making liability depend upon negligence, and to

make the carrier absolutely liable for any injury resulting from the use of a car the couplers of which did not in fact couple automatically by impact, even though their failure to do so was not occasioned by any negligence on its part, and could not have been prevented by any practicable degree of diligence. . . . But the whole Act either has for its purpose merely the regulation of the character of appliances to be used — the forms of mechanical devices to be employed — or it has a broader scope, and is designed as well to shift the burden of accidental, non-negligent injuries occurring in connection with such appliances from the injured employee, where the common law placed it, to the employer, in accordance with the modern theory that as a matter of legislative policy losses arising from injuries to workmen resulting from the use of complicated machinery should be counted as a part of the cost of production or operation. In declaring that 'the obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just,' the Supreme Court characterizes the whole Act as one cast in the larger mold. Its interpretation is authoritative and final."

Mr. Justice Moody, in delivering the opinion of the majority of the court in *St. Louis, I. M. and S. Ry. v. Taylor*, 210 U. S. 281, 295, 28 Sup. Ct.

Rep. 616, said: "If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

The Supreme Court of the United States in two decisions has followed its ruling in the *Taylor Case* sustaining the absolute character of the liability imposed by the Safety Appliance Acts upon the carriers subject to its terms, and holding that no degree of diligence will excuse a violation thereof. In the case of *Chicago, B. & Q. R. Co. v. United States*, 31 Sup. Ct. Rep. 612, Mr. Justice Harlan said: "It cannot then be doubted that this court in the *Taylor Case* considered the scope and effect of the Safety Appliance Act of Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the second section relating to automatic couplers imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that non-performance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers or reasonable diligence in using them and ascertaining their condition from time to time. That the *Taylor Case*, as decided by

this court, has been so interpreted and acted upon by the federal courts generally, is entirely clear as appears from the cases cited in the margin.<sup>1</sup>

"In *United States v. Atchison, T. & S. F. Ry. Co.*, 163 Fed. Rep. 517, Mr. Justice Van Devanter, then Circuit Judge, speaking for the Circuit Court of Appeals, referred to the *Taylor Case* in this court, saying: "It is now authoritatively settled that the duty of the railway company in situations where the congressional law is applicable is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master and of the non-liability of

<sup>1</sup> *United States v. Philadelphia & R. Ry. Co.*, 162 Fed. Rep. 403; *United States v. Lehigh Valley R. Co.*, 162 Fed. Rep. 410; *United States v. Denver & R. G. R. Co.*, 163 Fed. Rep. 519; *Chicago, M. & St. P. Ry. Co. v. United States*, 165 Fed. Rep. 423; *Donegan v. Baltimore & N. Y. Ry. Co.*, 165 Fed. Rep. 869; *United States v. Erie R. Co.*, 166 Fed. Rep. 352; *United States v. Wheeling & L. E. R. Co.*, 167 Fed. Rep. 198, 201; *Atlantic Coast Line R. Co. v. United States*, 168 Fed. Rep. 175, 184; *Chicago Junc. Ry. Co. v. King*, 169 Fed. Rep. 372, 377; *United States v. Southern Pac. Co.*, 169 Fed. Rep. 407, 409; *Watson v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942; *Wabash R. Co. v. United States*, 172 Fed. Rep. 864; *Atchison, T. & S. F. Ry. Co. v. United States*, 172 Fed. Rep. 1021; *Norfolk & W. Ry. Co. v. United States*, 177 Fed. Rep. 623; *United States v. Illinois Cent. R. Co.*, 177 Fed. Rep. 801; *Johnson v. Great Northern Ry. Co.*, 178 Fed. Rep. 646; *Siegel v. New York Cent. & H. R. R. Co.*, 178 Fed. Rep. 873.

the master for the negligence of a fellow servant were invoked by the railway company, and were held by the court to be superseded by the statute; . . . While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employee, and not a penalty, we perceive nothing in these differences which distinguishes that case from this. As respects the nature of the duty placed upon the railway company, section 5, relating to drawbars, is the same as section 2, relating to couplers, and section 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty.

"In view of these facts, we are unwilling to regard the question as to the meaning and scope of the Safety Appliance Act, so far as it relates to automatic couplers on trains moving interstate traffic, as open to further discussion here. If the court was wrong in the *Taylor Case* the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper. This court

ought not now disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the federal courts. To avoid misapprehension, it is appropriate to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the Safety Appliance Act. We only mean to say that until Congress, by an amendment of the statute, changes the rule announced in the *Taylor Case*, this court will adhere to and apply that rule."

In the case of *Delk v. St. Louis & S. F. R. Co.*, 31 Sup. Ct. Rep. 617, Mr. Justice Harlan said in his opinion: "The construction of the statute, adopted by a majority of the Circuit Court of Appeals to the effect that the act did not impose upon the carrier an absolute duty to provide and keep proper couplers at all times and under all circumstances, but was bound only to the extent of its best endeavor to meet the requirements of the statute, has been rejected by this court in *Chicago, Burlington & Quincy Railway Co. v. United States*, just decided, and on the authority of that case we hold that the Circuit Court of Appeals erred in the particular mentioned. . . .

"In this view, the judgment of the Circuit Court of Appeals must be reversed, because, for the

reasons above stated, it erred in not holding that the statute, under which the case arose, imposed on the carrier an absolute duty to provide its cars, when moving interstate traffic, with the required couplers, and keep them in proper condition, and that, too, without any reference to the care and diligence which might have been exercised in performing its statutory duty."

Thus, as interpreted by the highest court, the statute confers upon any employee who is injured by reason of any violation by a railroad of the prohibitions of the statute a right to maintain an action based upon the statute, and to recover against such railroad compensatory damages. In all such actions the statute provides that there shall be no application to such employee of the doctrine of "assumption of risk."

In the case of *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 31 Sup. Ct. Rep. 561, Mr. Justice Day, speaking of the Safety Appliance Act, said: "The statute at the time of the injury complained of took away assumption of risk on the part of the employee as a defense to an action for injuries received in the course of the employment. The defense of contributory negligence was not dealt with by the statute. [A footnote here introduced in the opinion recites the fact that "By the third section of the Act of April 22, 1908, 35 Stat. 65, amending the Employers' Liability Act,

no employee injured or killed is to be held guilty of contributory negligence in any case where the violation by a common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.] . . .

"In the present case the statute of Congress expressly provides that the employee shall not be deemed to have assumed the risk of injury if such is occasioned by his continuing in the employ of the carrier after the unlawful use of the car or train in the failure to provide automatic couplers has been brought to his knowledge. Therefore, when Schlemmer saw that the shovel-car was not equipped with an automatic coupler he would not from that knowledge alone take upon himself the risk of injury without liability from his employer.

"But there is nothing in the statute absolving the employee from the duty of using ordinary care to protect himself from injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employee was not for that reason absolved from the duty of using ordinary care for his own protection under the circumstances as they existed. This has been the holding of the courts in construing statutes enacted to promote the safety of employees. *Krause v. Morgan*, 53 Ohio St. 26; *Hallam v. Ry.*

*Co.*, 80 Wisc. 299; *Grand v. Ry. Co.*, 83 Mich. 564; *Taylor v. Manufacturing Co.*, 143 Mass. 470. And such was the holding of the Court of Appeals of the Eighth Circuit where the statute now under consideration was before the court. *Denver & Rio Grande R. Co. v. Arrighi*, 129 Fed. Rep. 347.

"In the absence of legislation, at the time of the injury complained of, taking away the defense of contributory negligence, it continued to exist. . . ."

In view of this authoritative declaration that, prior to the enactment of the Employers' Liability Act, contributory negligence was a defense to an action under the Safety Appliance Act, there is a temptation to inquire how there could have been any *contributory negligence* in an action not in itself based on *negligence*, but predicated upon the failure of defendant to comply with an *absolute standard* prescribed by statute.

Contributory negligence is a defense only in an action for negligence. Actions under the Safety Appliance Act in no manner depend upon negligence. *Delk v. St. Louis & S. F. R. Co.*, 31 Sup. Ct. Rep. 617.

However, inasmuch as Mr. Justice Day has, in the footnote to the *Schlemmer Case*, declared that in the present state of the law contributory negligence is *not* a defense, it is idle to pursue the matter further.

**§ 66. DUTY OF DEFENDANT RAILROAD THE SAME IN PERSONAL INJURY SUITS AS IN ACTIONS FOR STATUTORY PENALTY.**

The absolute mandatory obligation of an interstate railroad to comply with the provisions of the Safety Appliance Acts as to the equipment and maintenance of its trains, locomotives and cars is the same in remedial actions for personal injuries and in actions by the government for statutory penalties. *Atlantic Coast Line Ry. Co. v. United States*, 168 Fed. Rep. 175, 184; *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, 163 Fed. Rep. 517. In the latter case it was said, "Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action for personal injuries is to be deemed equally a violation in an action to recover a penalty."

This being true, the rules laid down in the cases of government prosecutions for penalties are applicable to cases in which suits are brought for a remedy in damages for death or personal injuries suffered by employees.

From those cases the following general rules may be deduced:

The Safety Appliance Acts<sup>1</sup> apply to any car

<sup>1</sup> The most comprehensive arrangement in small compass of all the cases under this statute (to January 1, 1910) may be found

used on an interstate railroad, *United States v. Chicago, M. & St. P. R. Co.*, 149 Fed. Rep. 486; *United States v. Great Northern R. Co.*, 145 Fed. Rep. 438; *United States v. Southern Ry. Co.*, 164 Fed. Rep. 347; *United States v. Wheeling & Lake Erie R. Co.*, 167 Fed. Rep. 198; *Wabash R. Co. v. United States*, 168 Fed. Rep. 1; "and manifestly the word 'car' was used in the statute in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject-matter, and object, 'any car' meant all kinds of cars running on rails, including locomotives." *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. Rep. 158.

The Safety Appliance Acts apply to passenger cars as well as freight cars, *Norfolk & W. Ry. Co. v. United States*, 177 Fed. Rep. 623; to a steam-shovel car, consisting of machinery bolted to a platform supported on trucks, *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. Rep. 406; to a tender, *United States v. Southern Ry. Co.*, 170 Fed. Rep. 1014; *Philadelphia & R. Ry. Co. v. Winkler*, 56 Atl. Rep. (Del.) 112; to a caboose, *United States v. Toledo Terminal R. Co.*, Kent's Index-Digest, 283; to an empty freight

in an Index-Digest of Decisions under the Federal Safety Appliance Acts, prepared by Otis Beall Kent, by direction of the Interstate Commerce Commission. (Pub. Doc.) Government Printing Office, Washington, D. C., 1910.

car, *Voelker v. Chicago, M. & St. P. Ry. Co.*, 116 Fed. Rep. 867; *Chicago, M. & St. P. Ry. Co. v. United States*, 165 Fed. Rep. 423; *United States v. Northern Pacific Term. Co.*, 144 Fed. Rep. 861; *United States v. St. Louis, I. M. & S. Ry. Co.*, 154 Fed. Rep. 516; *United States v. Wheeling & L. E. Ry. Co.*, 167 Fed. Rep. 198; *United States v. International & Great Northern R. Co.*, 174 Fed. Rep. 638; *Wabash R. Co. v. United States*, 168 Fed. Rep. 1; *Chicago & N. W. Ry. Co. v. United States*, 168 Fed. Rep. 236; *Mallott v. Hood*, 66 N. E. Rep. (Illinois) 247.

If in any train there is a car used in interstate traffic, this gives an interstate character to the whole of such train, and all cars must comply with the standards fixed by the Safety Appliance Acts. *United States v. Wheeling & L. E. Ry. Co.*, 167 Fed. Rep. 198; *United States v. Louisville & N. R. Co.*, 162 Fed. Rep. 185; *United States v. Chicago G. W. Ry. Co.*, 162 Fed. Rep. 775. (See also *United States v. International & Great Northern Ry. Co.*, 174 Fed. Rep. 638; *Chicago & N. W. Ry. Co. v. United States*, 168 Fed. Rep. 236; *United States v. Southern Pacific Co.*, 169 Fed. Rep. 407.)

Even the transportation in a train otherwise exclusively local and intrastate of a single package of interstate express matter was held to impress an interstate character upon the whole train, so

as to make it imperative that such train should be equipped in compliance with the Safety Appliance Law. *United States v. Colorado & N. W. Ry. Co.*, 157 Fed. Rep. 342, citing and following *The Daniel Ball*, 10 Wall. 557. The Safety Appliance Acts apply to terminal companies engaged in effecting a transfer of cars from one line of railway to another, if any of such cars are in use at the time in interstate traffic. *United States v. Northern Pac. Terminal Co.*, 144 Fed. Rep. 861. Also to Belt Line Railroads making similar transfers, although the lines of such Belt Line Railroad are exclusively within the lines of a state, a county, or a single city. *Belt Ry. Co. of Chicago v. United States*, 168 Fed. Rep. 542.<sup>1</sup> In *United States v. Union Stock Yards Co. of Omaha*, 161 Fed. Rep. 919, District Judge Munger defined a railroad within the meaning of the Act as follows: "A railroad has been defined as a road or way on which iron rails are laid for wheels to run on for the conveyance of heavy loads or vehicles. *Dinsmore v. Racine M. R. Co.*, 12 Wisc. 649. Such a

<sup>1</sup> This case has been taken to the Supreme Court by *certiorari*, and will soon be reached for argument in that court. The Belt Railway Company in its petition for *certiorari* relied upon *United States v. Geddes*, 131 Fed. Rep. 452; *Texas & P. Ry. Co. v. Interstate Commerce Com.*, 162 U. S. 197, 16 Sup. Ct. Rep. 666; *Gulf, C. & S. F. Ry. Co. v. Texas*, 204 U. S. 403; 27 Sup. Ct. Rep. 360; *United States v. Chicago, K. & S. Ry. Co.*, 81 Fed. Rep. 783; and dissenting opinion of Judge Phillips in *United States v. Colo. N. W. R. Co.*, 157 Fed. Rep. 321, 341.

track is a railroad independently of the use made of the track in the hauling of cars over it, as was pointed out in *Lake Superior & M. R. Co. v. United States*, 93 U. S. 442."

In affirming the judgment of the District Court in the *Union Stock Yards Company Case*, 169 Fed. Rep. 404, Judge Van Devanter said: "It must be conceded that the Stock Yards Company would not be a common carrier, nor the property used by it a railroad, if its operations were confined to maintaining the sheds or pens, to unloading shipments thereto, to loading shipments therefrom, and to feeding, watering, caring for, and otherwise handling live stock therein. But its operations are not thus confined. On the contrary, they include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and shipments of live stock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens, and *vice versa*, is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. . . .

"In these circumstances controlling decisions leave no room to doubt that it is a common carrier

engaged in interstate commerce by railroads within the meaning of the Safety Appliance Law."

Citing *United States v. Colorado & N. W. R. Co.*, 157 Fed. Rep. 321 (Petition for *cetiorari* denied, 209 U. S. 544, 28 Sup. Ct. Rep. 570); *United States v. Colorado & N. W. R. Co.*, 157 Fed. Rep. 342; *Chicago, M. & St. P. Ry. Co. v. Voelker*, 129 Fed. Rep. 522; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. Rep. 158; *McNeil v. Southern Ry. Co.*, 203 U. S. 543, 26 Sup. Ct. Rep. 722; *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 624, 29 Sup. Ct. Rep. 214, 218; *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 29 Sup. Ct. Rep. 246, 248.

In important decisions by the Circuit Court of Appeals for the Seventh Circuit the Safety Appliance Act has been applied to any cars in use by a railroad on its interstate highway. Disregarding the character of the car itself arising from its use in local traffic, that court holds the federal law to be applicable to any use of a car on the highway used by the railway for its interstate traffic. This interpretation will meet with adverse criticism, but in the end it will be authoritatively determined to be tenable and sound. Safety can be promoted on the interstate highways only by regulation vested in a single power, which may make rules sufficiently broad to safeguard all

traffic using such highway. By no other construction of the commerce clause can interstate traffic be safely regulated. The existence of two powers, each independently authorized to regulate and control the use of an interstate railroad highway, would lead to such confusion that neither of such powers could be effectually exercised. *Wabash Ry. Co. v. United States*, 168 Fed. Rep. 1; *United States v. Southern Ry. Co.*, 164 Fed. Rep. 347; *Wisconsin v. Chicago, M. & St. P. Ry. Co.*, 117 N. W. Rep. 686.

## CHAPTER XV

### DEFINITION OF A "USE" OF A DEFECTIVE CAR

#### § 67. WHAT IS A "USE" OF A DEFECTIVE CAR WITHIN THE MEANING OF THE SAFETY AP- PLIANCE ACTS?

Section 2 of the Act of 1893 forbids the carrier to "haul, or permit to be hauled *or used*," . . . any car not equipped in compliance with its terms.

Section 4 of the same Act forbids the carrier "to use any car" in violation of its terms.

Section 6 imposes a penalty when any car is "hauled or used" in violation of the Act; and the amended Act of 1903 applies "to all trains, locomotives, tenders, cars, and similar vehicles *used* on any railroad, etc."

The question what is a "use" of a car in violation of the statute has been considered in two cases recently decided. *Erie R. Co. v. Russell*, 183 Fed. Rep. 722, and *United States v. St. Louis Southwestern Ry. Co. of Texas*, 184 Fed. Rep. 28. In the first of these cases Circuit Judge Noyes, delivering the opinion of the court, said: "The first phase of this question is whether the car with the defective coupler was, at the time of the

accident, *in use* within the meaning of the amended Act.

"It is pointed out that the car was not being hauled at the time of the accident, but was standing upon a switch track for the insertion of the knuckle in the coupling apparatus, and it is contended that it was not then being used within the contemplation of the statute.

"We think, upon the authority of *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. Rep. 158, that this contention is not well founded. The car with the defective coupler was not withdrawn from use. Although billed to the repair shop, it was not sent there, nor was it sent to any place used especially for making repairs. The insertion of the knuckle was a simple matter. The car was stopped only temporarily, and it was intended to couple it to the other cars as soon as repaired."

In the second case, *United States v. St. Louis S. W. Ry. Co. of Texas*, Circuit Judge Shelby said: "The statute forbids hauling and using. Why were both words used? If the car was fully loaded, and on the track ready to be started as a part of an interstate train, with engine attached and fired, and requiring only the touch of the engineer to start, would not the car be 'used,' or *in use*, within the statute before it was hauled? If it was without the automatic coupler, so that the brakeman would have to go between the cars to

couple them, it would clearly be within the mischief the statute was intended to prevent. ‘Used’ has other meanings than ‘hauled.’ It is a broader word. To haul is to use, but may not a car be used within the statutory meaning otherwise than by being hauled?”

May there be any “use” of cars on an interstate railroad not within the scope of the Safety Appliance Laws? It is here to be noted that in the *Johnson Case*, 196 U. S. 1, 25 Sup. Ct. Rep. 158, and the *Schlemmer Case*, 205 U. S. 1, 27 Sup. Ct. Rep. 407, it was held that the Act applied to “all cars and similar vehicles *used* on any railroad engaged in interstate commerce.”

Notwithstanding the general and inclusive terms of this declaration of the Supreme Court as to the interpretation of the statute, and notwithstanding further the plain words of the statute as amended by the Act of 1903, some courts have read into the statute an exception relieving the railroad from liability when the “use” of a car was for the purpose of repair.

Any use of railroad equipment which endangers passengers or employees is clearly included in the statute; because it is the purpose of the Act to protect men from the dangers arising from defects in such equipment. The cause of the defect is of no materiality. Nor is the length of time the defect has existed at all important. Whether the

defect arises from ordinary use in railroading or from abusive handling is of no importance, if the statutory standards are not complied with at the time an employee is called upon to use the car for any purpose. Least of all is there any foundation for the claim that when the lack of compliance is so clear and manifest that cars are being moved for the purpose of repair, the railroad is then excused from liability to one who may be injured because of such lack of compliance.

Under such circumstances the peril to the employee is greatest. His use of the car is a use by the railroad. His action in handling or operating the defective appliances is action necessary in the interests of his interstate employer and to the carrying on of its interstate business.

It has been said that "repair shops cannot be kept on wheels." But this does not go to the heart of the question. The car becoming defective cannot be left on the main track to delay and obstruct the traffic of the road. It is the carrying on of the business of the railroad which requires its movement to a place of repair. Some employee must then incur the peril of getting such car out from other cars in a train and of chaining it up or otherwise connecting it with a locomotive for removal to a place for repair. Such action is entirely for the promotion of the business of the employer. It is wholly in his interest. No interest of the

employee is promoted by the incurring of such perils as are involved in work under such circumstances. The regular operation of the employer's business creates the peril. No good reason, therefore, exists for relieving the employer from the obligation imposed by the statute to compensate for injuries arising from such perils.

If the statute is ever to be a benefit and protection to the employee, it ought to be under the circumstances where he needs it most. As Chief Justice Fuller said in *Johnson v. Southern Pacific Company*, 196 U. S. 1, 25 Sup. Ct. Rep. 158, "The risk in coupling and uncoupling was the evil sought to be remedied." Thus, it is apparent that when any necessity for coupling or uncoupling exists, the statute applies. No other test effectuates the purpose of Congress.

It is important to bear in mind that in the argument in the *Johnson Case*, 196 U. S. 1, 25 Sup. Ct. Rep. 158, counsel for the railroad contended that "the mere intention to use an isolated car standing in a railroad yard for that purpose is insufficient to give it an interstate character." But the Supreme Court in its unanimous opinion rejected this contention, and said as to such a car "it was being regularly used in interstate traffic and so within the law."

So if any car regularly used in interstate commerce is defective as to its safety appliances

while it is in use on an interstate railroad, and this defective condition results in injury to any employee connected with its use for any of the legitimate purposes of the company, including the purpose to repair, the railroad is liable under the statute to compensate for such injuries.

Whatever question there may be as to the correctness of the view just stated as to cases arising before April 5, 1910, the date of the passage of the amended Act upon this subject, there is no doubt as to cases arising since that date that any movement of a car defective as to safety appliances generally used in interstate commerce is "at the sole risk of the carrier," and that the carrier is liable to any employee who may be injured as the result of the movement of a car for the purpose of repair, if its defective condition was the cause of such injury.

In *Siegel v. New York Central R. Co.*, 178 Fed. Rep. 873, 876, District Judge Archbald, delivering the opinion, said: "But the loss of its couplers having practically disabled it and put it out of commission, and the car, after that, being shifted solely for the purpose of getting it out from the midst of the others, and putting it in the way of being taken care of, from the moment that this was recognized and acted upon, it lost any interstate character, which it may have had before, and ceased to be hauled or used in moving inter-

state traffic, so as to make the company liable for injuries received because of its defective condition."

If this rule is correct, no recovery is open to those who incur the grave peril of performing as the agents of the railroads the necessary duty of arranging for and moving cars which are so manifestly defective as to require segregation and repair.

The rule overlooks the purpose of the Safety Appliance Acts to protect from just such dangers. It was for this purpose that the section was inserted, that knowledge of the defect should not be a basis of an assumption of risk.

The court does not place this decision on the ground that assisting in movement for repair creates an assumption of risk. Yet the obligation to assist in a movement to repair arises out of the contract of employment, or there is no such obligation. But there is an obligation somewhere on some agents of the railroad to move such defective cars when movement is necessary for repair. The contract of employment requires employees to assist in the movement of defective cars when necessary for repair. And as to the movement of such cars Congress has declared that there should be no construction of the employment contract that should create as one of its terms an assumption of risk.

Overlooking the obvious fact that if any obligation to assist in the movement of defective cars arises in the course of the employment, the terms of that obligation are fixed by the terms of the employment contract which the statute says shall not contain any assumption of risk, the court takes such a movement of a defective car out of the Act by one bold stroke in holding it not to be a movement in interstate commerce. The railroad is interstate. The employee is an interstate employee. The place of injury is an interstate highway. The car is an interstate instrumentality. The car is perhaps loaded with interstate traffic, but at all events is engaged in interstate traffic. The repair is one of the necessary incidents for the carrying on of the interstate business of the carrier. Repair is made upon a car generally used in interstate traffic to rehabilitate it for interstate traffic.

And yet the movement of such a car on such a railroad by such an employee for such a purpose, manifestly incidental to and necessarily arising out of the interstate business of the carrier, is said not to be an interstate movement. Let us apply this logic to another possible state of facts. Congress has power to regulate the liability of interstate railroads for their injuries to passengers. Suppose special provision required safe and sufficient rails. A rail becomes manifestly defective.

Repairs are attempted. While the rail is removed a train is wrecked because of this track defect. Would any court hold that by reason of repairs which were in progress the track had lost its interstate character?

Attention is directed to the strong statements of congressional purpose and intent upon this point in the recent report of the Committee on Interstate Commerce submitted to the Senate February 18, 1910, Senate Report No. 250, 61st Congress, 2d Session, page 3. In this report Senator Elkins, Chairman of the Committee, says on this subject: "The amendment proposed permitting movement without penalty of a defective car to a repair shop, when necessary, is deemed advisable, as the Supreme Court of the United States, in the *Taylor Case*, held that the present Act, which this Act amends and supplements, is absolute, and there is therefore great doubt as to the right of a railroad company to move even a defective car to a point of repair without incurring the penalties of the Act. It is with no intent of relieving the carriers from the construction put upon the Act by the courts in personal injury suits, so far as liability for injury to their employees is concerned, that this amendment is recommended. Such necessary movement is still to be at the risk of the carrier, and the absolute character of the Act in its remedial features as

determined in the *Taylor Case* is intended to be preserved and maintained under this proposed amendment.

"The carriers have urged this amendment to relieve them from penalties which they claim are possible under existing law, if a defective car is hauled to a repair shop, although such movement is one which must necessarily be made for the purpose of placing such car in repair. . . .

"It is one of the perils of the operation of the railroad for which train men are not at all responsible. As it is practically obligatory upon the train men to incur such dangers, there should be no impairment of any right of such train men by reason of the performance of such dangerous duty. As the law stands to-day prohibition of the movement of such defective car seems to be absolute, and the rights of the train men in operating such a car have been declared to be absolute. In removing the penalty for the hauling of such a defective car, when necessary, to a repair shop, it is intended by the terms of the proviso to preserve intact and unimpaired all the rights now existing by law to the train man, or his representative, to recover in case of injury or death resulting from the peril of participating in the movement of such a defective car.

"It is but just that the risk of working about and the movement of defective equipment should

be borne by the carriers. This amendment does not permit the movement of damaged cars in connection with those commercially used, and in every other respect the interests of the employees have been fully safeguarded."

When a car which Congress has required to comply with certain standards becomes so manifestly defective that repairs are necessary, does the car then cease to be interstate so that the congressional power cannot reach it? The manifest lack of compliance with the federal statute, of a car otherwise subject to its terms, does not render the federal power inapplicable to the subject matter of its regulation.

The subject matter of the repairs or repairing of defective cars is not withdrawn from the field of federal power. This subject matter may be of such an interstate character as to justify federal regulation. Congress has legislated upon it.

The "Act to supplement an Act to promote the safety of employees and travelers upon railroads," approved April 14, 1910, contained a proviso in substance that the fact that a movement of a car defective as to safety appliances was made for the purpose of repair, and that such movement was permitted by the Act without rendering the carrier liable for penalties, should not constitute a defense to the liability of the carrier to any employee injured by such movement. Congress evidently

believed that such a movement was interstate and was within the legitimate field of its power and authority.

If the rule laid down in the *Siegel Case* should be sustained, the trainmen, switchmen, and yardmen would be deprived of the protection which Congress has expressly intended to confer upon them, and would be compelled to bear without requital the burden of injuries in yard or switching movements of manifestly defective cars. Such movements are within the protection of the Act. Chief Justice Fuller said, in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. Rep. 158: "Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law."

Baker, C. J., in *Wabash R. Co. v. United States*, 168 Fed. Rep. 1, said: "The risks incurred in coupling and uncoupling are more imminent on switching tracks where trains are made up and distributed than on the main lines. It is not reasonable to suppose that Congress intended to cover only the smaller part of the dangers."

For other cases that yard movements and switching movements are within the scope of the Act, see *Crawford v. New York C. & H. R. R. Co.*,

reported in 10 Am. Neg. Rep. 166. *Mobile, J., & K. C. R. Co. v. Bromberg*, 37 Southern Rep. 395; *United States v. Southern Pacific Co.*, Kent's Index-Digest, 288.

If a car engaged in interstate commerce becomes defective so as to give rise to an action for an injury caused by such defect at any step of its journey on the main line or in a switching yard, how does the determination to repair it or the movement to repair it deprive the car of its interstate character?

While such a car is in an interstate train, is being taken out of an interstate train, or is being prepared for coupling to a locomotive or is being uncoupled from a locomotive, such locomotive being generally used in interstate commerce, or if such defective car is one generally used in interstate traffic, at no such time can the defective car be said to have lost its interstate character or to be beyond the power of control by Congress.

Such a car certainly cannot be said to have lost its interstate character while it remains loaded with any portion of its interstate traffic. If unloaded, and in the course of a journey to another State diverted temporarily for repair, it is not deprived of its interstate character by any such temporary diversion. This can no more be true than that its interstate character is lost by any stoppage on the road. There is no particular

local sanctity to a delay for repair which will make such delay operative to deprive a car of its interstate character, while during all other delays in transit the interstate character of a journey which is under way shall remain.

The true intent of the Safety Appliance Acts is not carried out, the remedial feature of these Acts, which is their dominant feature, is not sustained by an interpretation, which excludes from legal protection any employee injured by a defective car at any time until such car is segregated and isolated from all other interstate cars. When so isolated no necessity for coupling or uncoupling exists.

While its relation to other interstate cars presents any necessity for an operative coupler, the protection of the statute should apply to all whose duty to the railroad requires them to manipulate the coupling or uncoupling apparatus, or to assist in the movement of the car with the utilization of such substitutes for the automatic couplers as the necessities of the situation make requisite. This is the test of the scope of the statute.

Any narrowing of the application of the Safety Appliance statute, or any attempt at minimizing its protection to railroad employees, after the Supreme Court in three important cases has declared for a broad and liberal interpretation of the Act to carry out the true intent and purpose of Congress, cannot be justified. *Johnson v.*

*Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. Rep. 158; *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. Rep. 407; *St. Louis I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. Rep. 616.

Coupling or uncoupling a car on a repair track is as dangerous as when attempted anywhere else upon a railroad. A car is certainly in "use" when employees are called upon to couple it or uncouple it, even for repairs. While any necessity exists for coupling or uncoupling a car for any purpose on an interstate railroad, such car is in "use" within the meaning of the law. Whenever any of the purposes or uses of an interstate railroad require an operative automatic coupler for the safety of employees using or handling such car, the absence of such operative coupler cannot be excused.

To relieve the railroads from the stringency of this rule, so far as the same is applicable to penalty suits, Congress passed the Act of April 14, 1910.<sup>1</sup>

This Act permits a railroad, under the limited circumstances therein prescribed, to move a car for the purposes of repair, without incurring the penalty which would otherwise accrue from such use of the car.

<sup>1</sup> The full text of this statute will be found on pp. 328 of the Appendix.

But the Congress particularly and expressly provided that such a movement in any action for death or injury of an employee "should be at the sole risk of the carrier." In Senate Report No. 250, 61st Congress, 2d Session, The Committee on Foreign and Interstate Commerce says: "As there is danger in the movement of such defective cars, and as trainmen are obliged to handle them without any real option on their part so to do, it is but just and equitable that the risk attendant upon such movement, where death or injury to trainmen results, should be borne by the carrier *and not in any degree assumed by the trainmen.* In removing the penalty for the hauling of such a defective car, when necessary, to a repair shop, it is intended by the terms of the proviso to preserve intact and unimpaired all the rights now existing by law to the trainman or his representative, to recover in case of injury or death resulting from the peril of participating in the movement of such a defective car. It is but just that the risk of working about, and the movement of, defective equipment should be borne by the carriers."

This seems to make clear the congressional intent to make the carrier an insurer of its employees who may be called upon to handle cars, the safety appliances of which are defective.

**§ 68. DEFECTS IN VIOLATION OF SAFETY APPLIANCE ACTS.**

Civil actions under the Safety Appliance Acts for redress for injuries received on interstate railroads by employees may be maintained when the injury is the result of either of the following causes:

I. Absence of automatic coupler, or absence of or defects in any vital part of the coupler mechanism. The most common of these defects are:

- |                         |                               |
|-------------------------|-------------------------------|
| a. Coupler body broken, | h. Lock block missing,        |
| b. Knuckle broken,      | i. Knuckle pin missing,       |
| c. Knuckle pin broken,  | j. Lock block key missing,    |
| d. Lock block broken,   | k. Lock block trigger missing |
| e. Lock block bent,     | l. Lock block inoperative,    |
| f. Guard arm short,     | m. Knuckle pin bent.          |
| g. Knuckle missing,     |                               |

II. Defects in uncoupling mechanism.

- |                                |                                |
|--------------------------------|--------------------------------|
| a. Lock link broken,           | g. Uncoupling chain too long,  |
| b. Uncoupling lever broken,    | h. Uncoupling chain too short, |
| c. Uncoupling chain broken,    | i. Uncoupling lever missing,   |
| d. End lock or casting broken. | j. Lock link missing,          |
| e. Keeper broken,              | k. Uncoupling chain kinked.    |
| f. Uncoupling lever bent,      |                                |

III. Defects in height of couplers. See *Taylor Case*, 210 U. S. 281; 28 Sup. Ct. Rep. 618. But see also Regulation of Interstate Commerce Com-

mission adopted October 10, 1910, pursuant to section 3 of the Act of Congress entitled "An Act to supplement 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes,' and other safety appliance Acts, and for other purposes," approved April 14, 1910, a copy of which will be found in the Appendix, page 328.

IV. Absence of or defects in handholds. As the statute uses the terms "handholds in the ends and sides of each car," compliance with it requires at least one grab iron or handhold on each end and on each side of each car. *United States v. L. & N. R. Co.*, 156 Fed. Rep. 193; *United States v. Chicago & N. W. Ry. Co.*, 157 Fed. Rep. 616; *Dawson v. Chicago, R. I. & P. Ry. Co.*, 114 Fed. Rep. 870; *United States v. Boston & M. R. Co.*, 168 Fed. Rep. 148; *United States v. Wabash-Pittsburgh Term. Ry. Co.*, Kent's Index-Digest, 285. Such violations may consist either in:

- a. End handhold missing,
- b. Side handhold missing,
- c. Handhold bent, broken, or loose.

V. Absence of or insufficiency of power or train brakes.

By an order of the Interstate Commerce Commission dated June 1, 1911, made in accordance with the provisions of section 2 of the Act of March 1, 1903, trains must be equipped with a minimum of eighty-five per cent of air-braked cars. The full text of this order will be found on page 141 of the Appendix.

In cases arising because of failure of engineer to check the speed of his train in any emergency, the question of the sufficiency and the operative condition of the air brakes is at least eighty-five per cent of the case may be of importance, because if the federal law in this respect is not complied with ~~conspiracy~~ negligence as a defense will be eliminated.

Can there be a recovery where men are injured by falling from cars on which they were ordered to use the hand brakes? This question is now before the courts, whether such requirement of men to go up on the cars to operate the hand brakes is a violation of the Safety Appliance statute.

The United States instituted a suit against the Baltimore & Ohio Railroad in the Western District of Pennsylvania, 176 Fed. Rep. 114. Judge Orr, in that case, held that the requirement by the railroad that men go up on the tops of freight cars to operate the hand brakes is not a violation of the statute, and the judgment therein has been sustained by the Circuit Court of Appeals for

the Third Circuit. It should be noted, however, that the decision of the appellate court was rendered solely on technical grounds and without consideration of the merits.

There are so many cases of men killed or injured by falling from cars that the question of the lawfulness of requiring them to go upon the cars to use the hand brakes is important in determining the liability of railroads for such death or injuries. If such requirement is a violation of the statute, then as no contributory negligence or assumption of risk can avail the railroad, there would seem to be full liability for such casualties.

Where the full capacity of the brakes in all the air-braked cars is not available to check speed, by reason of air brakes in air-braked cars being out of repair, or having for any cause their air brakes "cut out" and not operated, and this lack of capacity to check speed leads to an accident to an employee within the protection of the Act, the question involved in the prosecution of the case against the Baltimore & Ohio Railroad, may be of importance. See *Lyon v. Charleston & W. C. Ry. Co.*, 56 S. E. Rep. 18.

VIII. And after July 1, 1911, on new cars put in service after October 13, 1910 as provided for in section 2 of the Act of Congress, April 14, 1910, any non-compliance with the terms and conditions of the Order of October 13, 1910, of

the Interstate Commerce Commission, relating to hand brakes, running boards, ladders, sill steps, clearance, etc., will entitle an employee injured by reason of such non-compliance to maintain his action under the Safety Appliance Act.

## APPENDIX

### **EMPLOYERS' LIABILITY ACT OF 1906**

(34 U. S. Stat. at L. 232, c. 3073)

[Held unconstitutional in the States (207 U. S. 463), but valid in the Territories and in the District of Columbia (215 U. S. 87)].

**An Act Relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars,

engines, appliances, machinery, track, roadbed, ways, or works.

SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

SEC. 4. That no action shall be maintained under this Act, unless commenced within one year from the time the cause of action accrued.

SEC. 5. That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety-appliance Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and

**EMPLOYERS' LIABILITY ACT OF 1908 319**

ninety-six, and March second, nineteen hundred and three.

Approved, June 11, 1906.

**EMPLOYERS' LIABILITY ACT OF 1908**

(35 U. S. Stat. at L. 65 c. 149)

**An Act Relating to the liability of common carriers by railroad to their employees in certain cases.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama

Canal Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee

shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

SEC. 7. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled "An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and

foreign nations to their employees," approved June eleventh, nineteen hundred and six.

Approved, April 22, 1908.

#### **EMPLOYERS' LIABILITY ACT AMENDMENT OF 1910**

An Act To amend an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*  
That an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

SEC. 2. That said Act be further amended by adding the following section as section nine of said Act:

"SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or

her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Approved, April 5, 1910.

#### SAFETY APPLIANCE ACTS

*Law of 1893 with amendment.*

[27 STAT. AT. L. 531, c. 196. AMENDED AS TO  
SEC. 6 BY 29 U. S. STAT. AT L. 85, c. 87.]

An act To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Sec. 2. That on and after the first day of January,

eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars

of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

SEC. 6. (*As amended April 1, 1896.*) 29 Stat. at L. 85. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car

from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Approved, March 2, 1893; amended, April 1, 1896.

#### SAFETY APPLIANCE ACT AMENDMENT OF 1903

[32 STAT. AT L. 943, c. 976.]

An Act To amend an act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and

SAFETY APPLIANCE ACT AMENDMENT 1903 327

their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

SEC. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and

failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

Approved March 2, 1903.

#### **SAFETY APPLIANCE ACT AMENDMENT OF 1910**

An Act To supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six,

SAFETY APPLIANCE ACT AMENDMENT 1910 329

and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply

with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission.

SEC. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided*, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equip-

ment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

SEC. 5. That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April

first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act.

SEC. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said commission are hereby extended to it for the purpose of the enforcement of this Act.<sup>1</sup>

Approved, April 14, 1910.

<sup>1</sup> The Act permits an extension of the period for compliance with its provisions "to the equipment of cars actually in service upon the date of the passage of this Act." As no standards were, however, fixed under the Act until October 13, 1910, it was impossible for the railroads to comply with its terms as to new cars placed in service between April 14, 1910, and October 13, 1910. Legislation to remedy this was recommended in the Annual Report to Congress of the Interstate Commerce Commission for 1910.

By a paragraph in the "Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth nineteen hundred and twelve, and for other purposes," approved March 4, 1911, it was provided that the jurisdiction of the Interstate Commerce Commission to extend the period within which any common carrier shall comply with the provisions of section three of the Act approved April 14, 1910, should apply to cars actually placed in service between the date of the passage of said Act (April 14, 1910) and the first day of July, 1911, in the same manner and to the same extent that it applies to cars actually in service upon the date of the passage of said Act.

An order of the Interstate Commerce Commission of March 13, 1911, extends the period of time within which common carriers shall comply with the provisions of section three of the Act of

**ACT IN "FORMA PAUPERIS"**

**An Act To amend section one, chapter two hundred and nine, of the United States Statutes at Large, volume twenty-seven, entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," and to provide for the prosecution of writs of error and appeals in *forma pauperis*, and for other purposes.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section one of an Act entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," approved July twentieth, eighteen hundred and ninety-two, be, and the same is hereby, amended so as to read as follows:

"That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of Congress approved April 14, 1910 in respect to the equipment of cars in service on the first day of July, 1911.

Another order of the Interstate Commerce Commission of March 13, 1911 designates in accordance with the Act of Congress approved April 14, 1910, the number, dimensions, location, and manner of application of the safety appliances mentioned in said Act, including hand-brakes, brake-steps, running boards, sill-steps, ladders, roof handholds, side handholds, horizontal end handholds, vertical end handholds, end platform handholds, uncoupling-levers, caboose platform steps, tender sill-steps, pilot sill-steps, pilot beam handholds, footboards, hand-rails and steps for headlights, and end ladder clearance.

error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal."

Approved, June 25, 1910.

#### LOCOMOTIVE ASH PAN ACT

35 U. S. STAT. AT L. 476, c. 225

An Act To promote the safety of employees on railroads.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

Sec. 2. That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier by railroad in any Territory of the United States or the District of Columbia to use any locomotive not equipped with an ash pan, which can

be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

SEC. 3. That any such common carrier using any locomotive in violation of any of the provisions of this Act shall be liable to a penalty of two hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge.

SEC. 4. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this Act.

SEC. 5. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 6. That nothing in this Act contained shall apply to any locomotive upon which, by reason of the use of oil, electricity, or other such agency, an ash pan is not necessary.

Approved, May 30, 1908.

**HOURS OF SERVICE ACT****34 U. S. STAT. AT L. 1415, 1416, c. 2939**

An Act To promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously

on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction

in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

SEC. 5. That this Act shall take effect and be in force one year after its passage.

Approved, March 4, 1907, 11.50 A. M.

**BOILER INSPECTION LAW**

36 U. S. STAT. AT L. 913

An Act To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances

thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

SEC. 3. That there shall be appointed by the President, by and with the advice and consent of the Senate, a chief inspector and two assistant chief inspectors of locomotive boilers, who shall have general superintendence of the inspectors hereinafter provided for, direct them in the duties hereby imposed upon them, and see that the requirements of this Act and the rules, regulations, and instructions made or given hereunder are observed by common carriers subject hereto. The said chief inspector and his two assistants shall be selected with reference to their practical knowledge of the construction and repairing of boilers, and to their fitness and ability to systematize and carry into effect the provisions hereof relating to the inspection and maintenance of locomotive boilers. The chief inspector shall receive a salary of four thousand dollars per year and the assistant chief inspectors shall each receive a salary of three thousand dollars per year; and each of the three shall be paid his traveling expenses incurred in the performance of his duties. The office of the chief inspector shall be in Washington, District of Columbia, and the Interstate Commerce Commission shall provide such stenographic and clerical help as the business of the offices of the chief inspector and his said assistants may require.

SEC. 4. That immediately after his appointment and qualification the chief inspector shall divide the territory comprising the several States, the Territories of New Mexico and Arizona, and the District of Columbia into fifty locomotive boiler-inspection districts, so arranged that the service of the inspector appointed for each district shall be most effective, and so that the work required of each inspector shall be substantially the same. Thereupon there shall be appointed by the Interstate Commerce Commission fifty inspectors of locomotive boilers. Said inspectors shall be in the classified service and shall be appointed after competitive examination according to the law and the rules of the Civil Service Commission governing the classified service. The chief inspector shall assign one inspector so appointed to each of the districts hereinbefore named. Each inspector shall receive a salary of one thousand eight hundred dollars per year and his travelling expenses while engaged in the performance of his duty. He shall receive in addition thereto an annual allowance for office rent, stationery, and clerical assistance, to be fixed by the Interstate Commerce Commission, but not to exceed in the case of any district inspector six hundred dollars per year. In order to obtain the most competent inspectors possible, it shall be the duty of the chief inspector to prepare a list of questions to be propounded to applicants with respect to construction, repair, operation, testing, and inspection of locomotive boilers, and their practical experience in such work, which list, being approved by the Interstate Commerce Commission, shall be used by the Civil Service Commission as a part of its examination. No person interested, either directly or indirectly, in any patented article

required to be used on any locomotive under supervision or who is intemperate in his habits shall be eligible to hold the office of either chief inspector or assistant or district inspector.

SEC. 5. That each carrier subject to this Act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this Act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the commission requires, shall become obligatory upon such carrier: *Provided, however,* That if any carrier subject to this Act shall fail to file its rules and instructions the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, being approved by the Interstate Commerce Commission, and a copy thereof being served upon the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: *Provided also,* That such common carrier may from time to time change the rules and regulations herein provided for, but such change shall not take effect and the new rules and regulations be in force until the same shall have been filed with and approved by the Interstate Commerce Commission. The chief inspector shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office and for the government of the district inspectors: *Provided, however,* That all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect.

SEC. 6. That it shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the chief inspector or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work. Each inspector shall make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of this Act, and as may be consistent with his other duties, but he shall not be required to make such inspections at stated times or at regular intervals. His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service. To this end each carrier subject to this Act shall file with the inspector in charge, under the oath of the proper officer or employee, a duplicate of the report of each inspection required by such rules and regulations, and shall also file with such inspector, under the oath of the proper officer or employee, a report showing the repair of the defects disclosed by the inspection. The rules and regulations hereinbefore provided for shall prescribe the time at which such reports shall be made. Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or the rules and regulations established and approved as hereinbefore stated, he shall notify the

carrier in writing that the locomotive is not in serviceable condition, and thereafter such boiler shall not be used until in serviceable condition: *Provided*, That a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition, because of defects set out and described in said notice, may within five days after receiving said notice, appeal to the chief inspector by telegraph or by letter to have said boiler reexamined, and upon receipt of the appeal from the inspector's decision, the chief inspector shall assign one of the assistant chief inspectors or any district inspector other than the one from whose decision the appeal is taken to reexamine and inspect said boiler within fifteen days from date of notice. If upon such reexamination the boiler is found in serviceable condition, the chief inspector shall immediately notify the carrier in writing, whereupon such boiler may be put into service without further delay; but if the reexamination of said boiler sustains the decision of the district inspector, the chief inspector shall at once notify the carrier owning or operating such locomotive that the appeal from the decision of the inspector is dismissed, and upon the receipt of such notice the carrier may, within thirty days, appeal to the Interstate Commerce Commission, and upon such appeal, and after hearing, said Commission shall have power to revise, modify, or set aside such action of the chief inspector and declare that said locomotive is in serviceable condition and authorize the same to be operated: *Provided further*, That pending either appeal the requirements of the inspector shall be effective.

SEC. 7. That the chief inspector shall make an annual report to the Interstate Commerce Commis-

sion of the work done during the year, and shall make such recommendations for the betterment of the service as he may desire.

SEC. 8. That in the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector. Whereupon the facts concerning such accident shall be investigated by the chief inspector or one of his assistants, or such inspector as the chief inspector may designate for that purpose. And where the locomotive is disabled to the extent that it can not be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The chief inspector or an assistant or the designated inspector making the investigation, shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the chief inspector.

The Interstate Commerce Commission may at any time call upon the chief inspector for a report of any accident embraced in this section, and upon the receipt of said report, if it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the commission deems proper. Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action

for damages growing out of any matter mentioned in said report or investigation.

SEC. 9. That any common carrier violating this Act or any rule or regulation made under its provisions or any lawful order of any inspector shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such attorneys, subject to the direction of the Attorney-General, to bring such suits upon duly verified information being lodged with them, respectively, of such violations having occurred; and it shall be the duty of the chief inspector of locomotive boilers to give information to the proper United States attorney of all violations of this Act coming to his knowledge.

SEC. 10. That the total amounts directly appropriated to carry out the provisions of this Act shall not exceed for any one fiscal year the sum of three hundred thousand dollars.

Approved, February 17, 1911.

**ORDER OF THE INTERSTATE COMMERCE COMMISSION, JUNE 6, 1910**

**IN THE MATTER OF REQUIRING AN INCREASE IN THE MINIMUM PERCENTAGE OF POWER BRAKES**

The Commission having under consideration the question of requiring an increase in the minimum percentage of power brakes to be used and operated on trains and railroads engaged in interstate commerce, as provided by section 2 of the Act of March 2, 1903,

and it appearing to the Commission after full hearing had on May 5, 1909, due notice of which was given all common carriers, owners and lessees engaged in interstate commerce by railroad in the United States, and at which time all interested parties were given an opportunity to be heard and submit their views, that to more fully secure the objects of the Act to promote the safety of employees and travelers on railroads, the minimum percentage of power-brake cars to be used in trains, as established by its order of November 15, 1905, should be further increased.

*It is ordered,* That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85% of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85% shall have their brakes so used and operated.

**ORDER OF THE INTERSTATE COMMERCE COMMISSION, OCTOBER 10, 1910**

**IN THE MATTER OF THE STANDARD HEIGHT OF DRAWBARS**

Whereas, by the third section of an Act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and

for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, that the Interstate Commerce Commission is hereby given authority, after hearing, to modify or change and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and

Whereas, a hearing in the matter of any modification or change in the standard height of drawbars was held before the Interstate Commerce Commission at its office in Washington, D. C., on June 7, 1910,

Now, therefore, in pursuance of and in accordance with the provisions of said section 3 of said act,

*It is ordered*, That (except on cars specified in the proviso in section 6 of the Safety Appliance Act of March 2, 1893, as the same was amended April 1, 1896), the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed — to wit: The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the centers of drawbars for standard-gauge railroads in the United States subject to said Act shall be 34½ inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be 31½ inches, and on narrow-gauge railroads in the United States subject to said act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 26 inches, and the minimum height of drawbars for freight cars on such narrow-gauge railroads measured in the same manner shall be 23 inches, and on 2-foot-gauge railroads in the United

States subject to said act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 17½ inches, and the minimum height of drawbars for freight cars on such 2-foot-gauge railroads measured in the same manner shall be 14½ inches.

*And it is further ordered,* That such modification or change shall become effective and obligatory December 31, 1910.



## **INDEX**



# INDEX

## ACCIDENTS

- bulletin of United States Bureau of Labor on, 52
- increasing, 180
- not result of act *malum in se*, 244
- number of, in United States, 52

## ACT IN "FORMA PAUPERIS"

- summary, 130
- text of, 333

## ACT OF CONGRESS

- supreme over state laws, 66

## ACTION

- administrator, not widow, to bring, 63
- survival of, 100
- under two thousand dollars, 234-238
- uniformity in different States not necessary to right of, 232
- venue of, 38, 100
- nature of,
  - new plenary action authorized, 63
  - rules of practice and procedure dependent on district
    - where action brought, 64
  - substantive rights and remedy dependent on Act, 64

## ADMINISTRATOR

- action by, 238
- damages held by, in trust, 270
- may bring suit, 270

## ADMIRALTY LAWS

- congressional power over, 149, 150

## AIR BRAKES

- eighty-five per cent of cars to be equipped with, 814

- ALGER, GEORGE W.  
in "Moral Overstrain," 180
- ANIMALS  
act to prevent cruelty to, in transit, 237
- ANNUITY TABLES, 128
- APPLIANCES  
action authorized for defect in, 37, 101  
(See SAFETY APPLIANCES)
- ARKANSAS STATUTE  
forbidding screening before weighing coal, 195
- ASH PAN LAW  
jurisdiction under, 236  
summary, 117  
text of, 334
- ASQUITH, PREMIER  
opinion of, 43, 56
- ASSUMPTION OF RISK  
abolished where safety statute violated, 58, 111  
employee freed from, by Act, 175  
included all perils of master's business, 204  
legal fiction, 49  
no contract for, enforceable, 102, 103  
not applied while car moving for repair, 302  
under Safety Appliance Acts, 286  
assented to by employee, 176  
to be implied under section 1, 102  
voluntary, 50  
onerous legal fiction, 178, 179
- AUTOMATIC COUPLER  
defects in, 312
- BOATS  
action authorized for defect in, 37, 101
- BOILER INSPECTION LAW  
(See LOCOMOTIVE BOILER INSPECTION LAW)
- BRAKES  
power or train, defects in, 313  
(See AIR BRAKES)

- CALIFORNIA STATUTE**  
regulating laundries, constitutional, 192
- CARS**  
action authorized for defect in, 37, 101  
"any car" defined, 290  
defects in, violating Safety Appliance Acts, list of, 312-316  
eighty-five per cent of, to be air-braked, 314  
(See DEFECTIVE CARS)
- CHILDREN**  
survival of action for benefit of, 100
- CIGARETTES**  
sale of, without license, prohibited, 196
- CLASSIFICATION**  
legislature has wide discretion in, 212
- CLASSIFICATION OF RAILROAD EMPLOYEES**  
adopted in England, 223  
exception to law as to issue of passes, 223  
gives remedy only to injured or killed, 222  
judicially adopted in fellow-servant doctrine, 203-208  
limited to servants engaged in interstate commerce, 222  
may include those not exposed to peculiar hazards, 215  
Minnesota statute excepting certain employees constitutional, 213  
not arbitrary, 214  
reasonable, 220  
state statutes adopting, constitutional, 216  
urged as discriminatory, 202
- COMITY BETWEEN STATES**, 257
- COMMERCE**  
power of Congress over, defined, 153-155  
valid regulation of, not affected by freedom of contract, 187  
(See INTERSTATE COMMERCE)
- COMMERCE POWER**  
real-estate owner may be restrained under, 170
- COMMON CARRIER**  
shipper not on equal footing with, 163
- COMMON EMPLOYMENT**  
(See FELLOW-SERVANT DOCTRINE)

**COMMON LAW**

rule of, gives no vested right, 172

**CONGRESS**

executed contract may be impaired by, 158

express power of, not impaired by freedom of contract, 185

jurisdiction of federal courts determined by, 250

power of, over commerce defined, 153-155

to regulate master and servant in interstate commerce, 133, 135-140

regulations of, not affected by private contracts, 185

rights of, under express powers, paramount, 191, 234

war power of, 240

**CONGRESSIONAL INTENT**

as to Employers' Liability Act of 1908, 39-42

movement of defective cars, 304-306, 310

section 1 of Act of 1908, 109, 110

**CONSTITUTION**

loose construction of, brought about by freedom of contract, 199, 200

sixth article of, 261

state courts may construe, 260

supreme law of United States, 191

**CONSTITUTIONALITY OF EMPLOYERS' LIABILITY****ACT OF 1908**

denied in Connecticut, 133

objections to, 133

upheld in lower federal courts, 132, 133

(See **EMPLOYERS' LIABILITY ACT OF 1908**)

**CONTRACTS**

obligation of, may be impaired by Congress, 159

valid when made, rendered null by Congress, 198

(See **FREEDOM OF CONTRACT; LIBERTY OF CONTRACT; RIGHT OF CONTRACT**)

**CONTRIBUTION**

right of, left to employer, 244, 245

**CONTRIBUTORY NEGLIGENCE**

abolished as defense in certain cases, 37

where safety statute violated, 111

**CONTRIBUTORY NEGLIGENCE — *Continued***

- available as defense unless excluded by statute, 120
- eliminated if air brakes insufficient, 314
- in mitigation of damages, 38, 60
- no defense, where statute violated, 58
  - under Safety Appliance Acts, 288

(See NEGLIGENCE)

**COOLEY, JUDGE**

- address on interstate commerce, 68

**DAMAGES**

- annuity tables used in computing, 128
- contributory negligence in mitigation of, 38, 60
- for death as amended in 1910, 127
  - death prior to Act of 1910, 126
  - personal injuries, 126
- held by personal representatives in trust, 270
- no statutory limit, 39
- under \$2,000 in State courts, 234-238

**DANGEROUS TRADES**

- wages, not higher in, 47

**DEATH**

- suit for, authorized, 38

**DEATHS FROM ACCIDENTS TO WAGE EARNERS**

- number of, in United States, 52

**DEFECTIVE CARS**

- amendment of 1910 as to, 306, 310
- congressional intent as to movement of, 304-306, 310
- liability for injury while moving, for repair, 299-311
- movement of, interstate commerce, 303, 306, 308, 309

**DEFECTS, IN VIOLATION OF SAFETY APPLIANCE ACTS**

- list of, 312-316

**DUE-PROCESS CLAUSE**

- complied with by act, 171

(See FIFTH AMENDMENT)

**ELY, RICHARD T.**

- Outlines of Economics, 164

**EMPLOYEE**

has no opportunity to control fellow-servant, 55, 56  
(See also **FELLOW-SERVANT DOCTRINE**)

**EMPLOYEES**

what, engaged in interstate commerce, 84-98  
(See also **INTERSTATE COMMERCE**)

**EMPLOYERS' LIABILITY ACT OF 1906**

text of, 317  
unconstitutional in States, 34, 317  
valid in Territories and District of Columbia, 317

**EMPLOYERS' LIABILITY ACT OF 1908**

action under, enforceable in state courts, 245-273  
amended 1910, 34, 37  
amendment of 1910, not retroactive, 64  
applies to all interstate employees of railroads, 35  
interstate electric lines, 83  
assumption of risk not to be implied under § 1 of, 102  
authorizes new plenary action, 63  
classification under, attacked, 207  
constitutional in certain state courts, 132, 133  
lower courts, 132  
constitutionality challenged, 133  
construction of Act, 99  
§ 1 of, 101-110  
contract for assumption of risk not enforceable under, 102,  
106, 107  
creates new rights and new obligations, 64  
enlarges liability of carriers, 102  
fourteenth amendment not in conflict with, 208  
frees employee from legal fiction, 175  
includes employees engaged in interstate commerce, 84-  
98  
jurisdiction under, in cases under \$2,000, 236  
made concurrent in 1910, 273  
legislative intent of, 39-42  
not modified by conflicting statutory or common-law rules  
of States, 63  
not retroactive, 99  
passed, 34

**EMPLOYERS' LIABILITY ACT OF 1908—*Continued***

promotes safety of employees, 39, 42  
    safety of passengers, 41  
recommended by President Roosevelt, 34, 39  
summary, 37  
supersedes state laws giving right of action to interstate  
    employee, 65  
text of, 319  
trials of causes, changed by, 268  
unconstitutional in Connecticut, 133, 230  
where applicable, exclusive, 65

**EMPLOYERS' LIABILITY ACT AMENDMENT OF 1910**

jurisdiction made concurrent by, 273  
text of, 322

**EMPLOYERS' LIABILITY ACTS**

among States, 39  
first enacted in England, 56  
in Australia, 44  
    British Columbia, 44  
    Cape of Good Hope, 44  
    Continental States of Europe, 40  
    England, 39  
    New Zealand, 44  
    North Carolina, 103  
report of committee on English, 176, 177  
report of New York Commission on, 47, 51, 54

**EMPLOYMENT**

causal relation of, to injury, 96  
commences when servant rightfully enters premises of  
    master, 92  
tortious act not related to, 96

**ENGINES**

action authorized for defect in, 37, 101

**ENGLISH EMPLOYERS' ACT OF 1880, 104****ENGLISH PARLIAMENTARY COMMITTEE**  
report of, 176, 177**EQUAL PROTECTION OF LAW CLAUSE**  
(See **FOURTEENTH AMENDMENT**)

**EQUIPMENT**

action authorized for defect in, 37, 101

**EVIDENCE**

rules of, in state courts not disregarded, 233

**EXECUTOR**

action by, 238

(See also PERSONAL REPRESENTATIVE)

**FAULKNER, CHARLES J.**

Counsel for Railroads, 121

**FEDERAL ACT**

(See EMPLOYERS' LIABILITY ACT OF 1908)

**FEDERAL COURTS**

jurisdiction defined by Congress, 250

**FEDERAL RIGHTS**

enforceable in state courts, 256

**FELLOW-SERVANT ACT OF INDIANA**

applied to members of construction crew, 216

**FELLOW-SERVANT DOCTRINE**

abolished by Act, 37, 57

basis of, 45-57

claim that employee voluntarily assumes risk, 48

classified together all railroad employees, 203

compensation in wages, an illogical basis, 47

created by courts, 57

employee has no opportunity to control fellow-servant, 55

Hoxie case comment on, rebutted by Connecticut court, 274,  
275

increases accidents to employees, 52

in general, 45

intent of Act to abrogate, 57

North Carolina statute abolishing, 219

perils compensated in wages, 45

public policy, not sound basis for, 51

query as to intrastate servants being in common employment, 63

risk of injury an obvious risk of employment, 53

saves industry from being overburdened, 54

**FELLOW-SERVANT DOCTRINE — *Continued***

- theory that makes employees more watchful of each other,  
    answered, 55
- voluntary assumption of risk, a legal fiction, 49
- where circumscribed, evils decrease, 52

**FIFTH AMENDMENT**

- due process clause of, complied with by Act, 171
- not invaded by regulations for public health or safety, 169,  
    170
- not invaded by sumptuary legislation, 169
- not violated by constitutionally authorized penalty, 174
- violation of, claimed, 157

**FOREIGN COMMERCE**

- regulation of interstate, as ample as that of, 151

**FOSTER'S FEDERAL PRACTICE, 235****FOURTEENTH AMENDMENT**

- defined, 217
- normal exercise of governmental power not restrained  
    by, 208
- no restraint of police power, 211
- not concerned with unpolicy or injustice of state laws, 218
- permits different measure of damages in different cases, 218
  - rule of responsibility in different cases, 218
- special legislation, 218
- power to classify not taken away by, 209-220

**FREEDOM OF CONTRACT**

- basis of denial of right of relief, 182
- contracts to avoid consequences of negligence to freight,  
    not impaired by, 184
- endangers property interests, 199, 201
- express legislative power not impaired by, 185
- limited by public health, morals or safety, 192
- loose construction of Constitution brought about by, 199,  
    200
- misapplication of, means strikes, 183
- not proper basis for assumption of risk doctrine, 176, 180
  - test of validity of legislation, 198
  - unduly abridged by Act, 157-201
- theoretical, sometimes against public policy, 160-165

**FREEDOM OF CONTRACT — *Continued***

unreasonable as relief from consequences of injury to men,  
184  
valid regulations of commerce not affected by, 187  
(See **LIBERTY OF CONTRACT; RIGHT OF CONTRACT**.)

**FULLER, R. H.**

representing Railroad Brotherhoods, 122, 123

**FUND**

beneficiaries of, determined by Act, 241  
created by Act, 238  
not part of workman's estate, 241

**GRAIN**

contracts for future options on, prohibited, 197  
regulation of storage of, constitutional, 192

**GUARDIANS**

Act punishing, constitutional, 239

**HAND BRAKES**

operation of, query as to violating Safety Appliance Acts, 314

**HANDHOLDS**

defects in, 313

**HEIGHT OF COUPLERS**

defects in, 312

**HEPBURN ACT, 236****HOURS OF SERVICE LAW**

constitutional, 116, 117, 139

text of, 336

violation of, gives absolute right, 115, 116

**HOUSE OF REPRESENTATIVES**

minority report of Committee on Act, 61

**HOXIE CASE**

argument of, answered by Iowa court, 265-272

review of, 230-275

**INDEMNITY FUND**

contributions of employer to, deducted from damages, 38

**INJURY**

Act causing, must be in prosecution of master's business, 97  
causal relations between employment and, 96  
liability for, while car moved for repair, 299-311  
no recovery for, caused by plaintiff's own negligence, 99

**INSURANCE FUND**

contributions of employer to, deducted from damages, 38

**INTERNATIONAL TEXT BOOK COMPANY CASE, 70****INTERSTATE COMMERCE**

any car used in, makes train interstate, 291  
business of interstate electric lines included in, 82  
character of shipment attaches with loading, 74  
not changed by interruption of transit  
at State line, 74

Chicago rioters interfere with, 226

classification of employees limited to those engaged in, 219,  
222

constitutional power over, not affected by freedom of contract, 185-198

employees, instrumentalities of, 144

employment must relate to movement of, 87, 90

human agency most important factor in, 147, 155, 158

includes business by correspondence, 73

intercourse by telegraph, 71

intrastate servants may interfere with, 226

liability of railroad engaged in, not affected by ownership of traffic, 73

local railroad accepting traffic from another State, engaged in, 77, 78, 79

local reshipment by new consignor not included in, 79

membership in labor organization not connected with, 186

method of proof of transaction of, 82

movement of defective car, part of, 303, 306, 308, 309

occupation of employees of interstate carrier is, 141

participation in, subjects to Federal Government, 75

power over, includes regulation freight rates, 140, 141

railroad, when engaged in, 68-83

railroad when engaged in, summary from authorities, 81

regulation of, as ample as that of foreign, 151-152

**INTERSTATE COMMERCE — *Continued***

- report of Senate committee on, in 1910, 304-306, 311
- schedule of interstate rates open to public inspection, 82
- shipment through contiguous State to point in State of origin, 76
- switching of interstate cars included in, 80
- train carrying single interstate express package engaged in, 291
- what employees engaged in, 84-98
- what is a regulation of, 136, 137

**INTERSTATE COMMERCE COMMISSION**

- annual report of, asks authority to extend time for compliance, 332
- authority to extend time given to, by Act of March 4, 1911, 332
- immunity before, extends to state courts, 263
- non-compliance with orders of, violates Safety Appliance Acts, 315
- opinion of, as to interstate electric lines, 83
- order of June 6, 1910, as to air brakes, 314
  - text of, 346
- order of March 13, 1911, as to extension of time of compliance, 332
- order of October 10, 1910, as to height of couplers, 313
  - text of, 347
- order of March 13, 1911, as to safety appliance equipment, 333

**INTERSTATE SERVANTS**

- impossible to segregate, 228, 229

**INTRASTATE SERVANTS**

- impossible to segregate, 228, 229
- within control of interstate employer, 225, 226

**JUDICIAL REVIEW**

- subjects of, defined, 197, 199, 200

**JUDICIARY ACT OF 1789, 250****JUDICIARY ACT OF 1875, 237****JUDICIAL CODE OF 1911, 38**

**JURISDICTION**

concurrent, in state and federal courts, 100  
of state courts, 245-273  
of United States not foreign to States, 252

**JURISDICTION OF SUITS UNDER ACT**

in either federal or state courts, 38  
in state courts under \$2,000, 234-238  
in United States Circuit Court, 38  
removal from state to federal courts forbidden, 38  
transferred to district courts by Judicial Code, 38

**KENT'S COMMENTARIES, 246****KENT'S INDEX-DIGEST**

of decisions under federal safety appliance act, 289

**LABATT, C. B.**

on Master and Servant, 29, 30, 52, 56

**LABOR,**

hours, of, prescribed by state, 196  
Utah statute regulating hours of, constitutional, 193  
(See **HOURS OF SERVICE LAW**)

**LA FOLLETTE, SENATOR,**

proposes first draft, 121

**LAISSEZ FAIRE THEORY**

outworn, 181

**LEGISLATIVE BRANCH,**

limitations of, not applied to judicial branch, 259, 260

**LEGISLATIVE DISCRETION,**

unlimited within its powers, 197

**LIABILITY OF MASTER UNDER STATUTE**

"Contracting out", forbidden, 38

**LIBERTY OF CONTRACT**

merely a common-law right, 166

not a property right, 166, 167

interfered with by Hours of Service Law, 139

(See **FREEDOM OF CONTRACT ; RIGHT OF CONTRACT**)

**LOCOMOTIVE ASH PAN LAW**

(See **Ash Pan Law**)

**LOCOMOTIVE BOILER INSPECTION LAW**

- summary, 118
- text of, 339

**MACHINERY**

- action authorized for defect in, 37, 101

**MARITIME COMMERCE**

- regulated under commerce power, 151

**MASSACHUSETTS STATUTE**

- requiring vaccination, constitutional, 195

**MASSACHUSETTS WORKMEN'S COMPENSATION ACT,**  
57**MASTER AND SERVANT,**

- contract between, altered by legal fiction, 178, 179

- engine wiper crossing yard, relation of, 93

- loader injured leaving boat, relation of, 93

- not on equal footing, 161-165

- regulation of, incident to express power of Congress over  
interstate commerce, 133, 135-140

- a regulation of terms of moving interstate  
commerce, 140-142

- promotes industrial peace, 142, 143

- relations of, not local, 146, 147

- regulated in merchant marine, 134

- when servant rightfully on premises, 92

- servant on public highway, relation of, 95

- walking on tracks, relation of, 94

- state legislation upon, valid unless Congress acts, 138

- two schools as to construction of enactments relating to, 29, 30

**"MORAL OVERSTRAIN,"** 180**NAVIGATION**

- regulated under Commerce Clause, 148, 149

**NEGLIGENCE**

- as to equipment, basis of action, 37

- carrier liable for, of officers, agents or employees, 98

- malum prohibitum* not *malum in se*, 244

**NEGLIGENCE — *Continued***

no recovery for injury caused by plaintiff's, 99  
where that of employee primary cause, no recovery, 60  
(See **CONTRIBUTORY NEGLIGENCE**)

**NEW YORK COMMISSION ON EMPLOYERS' LIABILITY, 47, 51, 54****PENSION CLAIMS**

regulation of fees of attorneys for, constitutional, 193

**PERSONAL REPRESENTATIVES**

action by, 238  
interpreted to mean heirs, 242  
(See **ADMINISTRATOR AND EXECUTOR**)

**PILOTS**

regulation of, under commerce clause, 147

**PLEADING**

necessity of, basis for Federal Right, 66  
rules of, in state courts not disregarded, 233  
special, of Act not necessary in federal courts, 66

**POMEROY, CONSTITUTIONAL LAW, 149, 246****PROHIBITION**

legislation for, valid, 196

**PUBLIC POLICY**

best, considers injuries as part of cost of production, 40  
theoretical freedom of contract sometimes against, 160-165

**PUBLIC SERVICE**

reasonable charges for, valid, 196

**RAILROAD**

duty of, under Safety Appliance Acts, 283, 284  
held to liability of insurer, 243, 244  
Nebraska act so holding constitutional, 245  
station refreshment room, not part of, 91  
when engaged in interstate commerce, 68-83  
(See also **INTERSTATE COMMERCE**)

**RAILROAD BROTHERHOODS**

represented at hearing, 122

**RAILROAD COUNSEL**

- claim a discriminatory classification, 202
- contention of, sustained in Connecticut, 157
- report of committee of, 32

**RAILROAD EMPLOYEES**

- classified together by fellow-servant doctrine, 203
- hazardous for, if injured, 222

(See **CLASSIFICATION OF RAILROAD EMPLOYEES**)

**RIGHT OF CONTRACT**

- no limitation upon Congress to restrict, 158
- not a property right, 167, 168
- subject to power of Congress, 195
  - state authority for public health, safety or morals, 196

(See **FREEDOM OF CONTRACT; LIBERTY OF CONTRACT**)

**ROADBED**

- action authorized for defect in, 37, 101

**ROOSEVELT, PRESIDENT**

- message of, 34, 43, 222

**RUEGG'S "EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION," 50****SAFETY APPLIANCES**

- list of, 316, 333

**SAFETY APPLIANCE ACTS**

- any car on interstate highway included under, 294
- amendment of 1903, text of, 326
  - 1910 as to defective cars, 306, 310
  - 1910, text of, 328
- amendment of Senator White to original act, 277
- assumption of risk not applied under, 286
- Belt Line Railroad included under, 292
- cases, list of, decided under, 276, 277, 278
- common law changed by, 280, 281
- construction of, 280, 281, 285, 286
- contributory negligence not a defense under, 288
- definition of "use" of defective car under, 296-311
- defects in violation of, list of, 312-316

- SAFETY APPLIANCE ACTS—*Continued***  
duty under, in personal-injury suits, 289  
in suits for penalty, 289, 290  
hand brakes, operation of, query as to violating, 314  
interstate traffic in one car brings train under, 291  
law of 1893 with amendment of 1896, text of, 323  
liability absolute, where violated, 278–288  
personal injuries, liability for, while car moved for repairs,  
    299–311  
reasonable care, not sufficient under, 283  
Stock Yard Company included under, 293  
terminal companies included under, 292  
time for compliance with, extended, 332, 333  
violated by non-compliance with orders of Interstate Com-  
    merce Commission, 315  
violation of, gives absolute right, 112–114  
    abolishes assumption of risk, 37, 111  
    contributory negligence, 37, 111  
words “any car” in, defined, 290  
(See also **STATUTES FOR SAFETY OF EMPLOYEES; HOURS  
OF SERVICE LAW; ASH PAN LAW; LOCOMOTIVE BOILER  
INSPECTION LAW; and STATE STATUTES**)
- SENATE COMMITTEE ON INTERSTATE COMMERCE**  
report of, in 1910, 304–306, 311
- SENATE JUDICIARY COMMITTEE**  
intent of, to change common-law rules, 42  
report of, in 1910, 42, 61, 62
- SHEARMAN AND REDFIELD ON NEGLIGENCE, 264**
- SMITH, “MASTER AND SERVANT,” 244**
- SOVEREIGNTY OF STATES**  
not reduced, 230–234  
    (See **UNITED STATES**)
- STATE COURTS**  
comity between States recognized by, 257, 258  
federal Constitution may be construed by, 260  
rights enforceable in, 256, 266, 267  
statute of limitations applied in, 262  
jurisdiction of, 245–273  
    over postmaster in, 248

- STATE COURTS — *Continued***  
    remedy under federal law, sometimes prescribed by, 254  
    removal from, forbidden, 273  
    reviewable while enforcing national legislation, 247, 250
- STATE LAWS**  
    yield to federal power, 191
- STATE STATUTES FOR SAFETY OF EMPLOYEES**  
    included in terms of Employers' Liability Act of 1908, 119  
    inclusion of, not constitutionally objectionable, 124, 125  
    intent of Congress so to include, 121, 122, 123
- STATUTE OF LIMITATIONS**  
    two years from cause of action, 39
- STATUTES FOR SAFETY OF EMPLOYEES**  
    violation of, abolishes assumption of risk, 111  
        abolishes contributory negligence, 111  
(See also **SAFETY APPLIANCE ACTS; HOURS OF SERVICE LAW; ASH PAN LAW; LOCOMOTIVE BOILER INSPECTION LAW; and STATE STATUTES**)
- STORY ON CONSTITUTION**, 149
- STRIKES**  
    encouraged, 183
- SUIT BY POOR PERSON**  
    summary, 130  
    text of Act, 333
- SUMPTUARY LEGISLATION**  
    sustained, 169
- SURVIVAL OF ACTION**, 39, 100
- TAFT, PRESIDENT**  
    opinion of, 42
- TRACK**  
    action authorized for defect in, 37, 101
- UNCOUPLING MECHANISM**  
    defects in, 312
- UNITED STATES**  
    sovereignty of, concurrent with States, 252  
        paramount within its jurisdiction, 252

UNITED STATES BUREAU OF LABOR  
bulletin on accidents, 52

UNITED STATES MAIL  
query as to carriage of, making railroad interstate, 70

VENUE OF ACTION, 38, 100

WAGES

not higher in dangerous trades, 47

WHARTON, DR. FRANCIS  
in Southern Law Review, 55

WHARVES

action authorized for defect in, 37, 101

WIDOW

survival of action for benefit of, 100

WOMEN

employment of, in laundries more than ten hours a day  
prohibited, 197

WORKMEN'S COMPENSATION ACT  
in Massachusetts, held constitutional, 57

WORKS

action authorized for defect in, 37, 101

WRONGDOERS

no contribution between, 244